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In the Supreme Court of the United States

OCTOBER TERM, 1977

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

CHARLESTONE STONE PRODUCTS CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.,
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v.

CHARLESTONE STONE PRODUCTS CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-17a) is reported at 553 F. 2d 1209. The district court's opinion (App. C, *infra*, pp. 19a-27a) is not reported. The decision of the Interior Board of

Land Appeals (IBLA) (App. D, *infra*, pp. 28a-58a) is reported at 9 IBLA 94.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, p. 18a) was entered on May 12, 1977. By order of August 1, 1977, Mr. Justice Rehnquist extended the time within which to file a petition to and including September 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether water is a locatable mineral under the mining law of 1872.

STATUTES INVOLVED

Section 9 of the Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51, provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *.

Section 17 of the Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52, provides:

> All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title.

Section 1 of the Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22, provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

STATEMENT

Since 1872 the federal mining laws have permitted citizens to explore, discover and extract valuable minerals from the public domain and to secure fee title to lands containing such discoveries. Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq; Cameron* v. *United States*, 252 U.S. 450, 460. The claimant must establish that he has discovered a valuable mineral deposit within the limits of each claim. *Cole* v. *Ralph*, 252 U.S. 286, 295. The test for value is the "prudent man test," *Chrisman* v. *Miller*, 197 U.S. 313, 322, augmented by the marketability test, *United States* v. *Coleman*, 390 U.S. 599, 602-603. The combined tests require evidence of a mineral deposit of

such character that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable expectation that the minerals from the claims could be marketed at a profit. In 1955 Congress withdrew "common variety" minerals such as sand and gravel from location under the mining laws. Act of July 23, 1955, Section 3, 69 Stat. 368, as amended, 30 U.S.C. 611. Consequently a claimant to a deposit of such minerals must show that there was a valuable discovery prior to the 1955 withdrawal date, *Cameron* v. *United States*, 252 U.S. 450, 462, as well as at the time of the administrative hearing. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336.

The Secretary of the Interior initiated this action in 1965, contending that each of 25 sand and gravel placer mining claims near Las Vegas, Nevada, held by Charlestone Stone Products Co., Inc.,[1] was invalid for want of a timely discovery of a valuable mineral prior to July 23, 1955, the date common variety minerals became no longer locatable.[2] Following a

[1] The claims were the Charlestone, Charlestone Nos. 1-22, and Nos. 12A and 13A (App. D, *infra*, p. 33a). The courts below apparently omitted the Charlestone from their discussion inadvertently, as they refer to only 24 claims, but we assume that the decisions below apply to the Charlestone as well. (Although the name on the claims is actually "Charleston," and both the claims and respondent were so denominated in the administrative record (see App. D, *infra*, p. 33a), in the courts below respondent has used the name "Charlestone," and those courts have applied this spelling to the claims as well as to respondent. We do the same to minimize confusion.)

[2] Act of July 23, 1955, Section 3, 69 Stat. 368, as amended, 30 U.S.C. 611.

full hearing, an administrative law judge found that the sand and gravel in question were common variety minerals and that Charlestone had established the discovery of a valuable mineral by the critical date only as to claim 10[3] (see App. D, *infra*, p. 32a). The Interior Board of Land Appeals affirmed (App. D, *infra*, p. 58a).

The United States District Court for the District of Nevada reversed, holding that (1) the testimony of the Secretary's only witness, an expert mining engineer, should not have been credited by the agency on the issue of marketability, since he was not personally conversant in 1955 with the local market for sand and gravel from the claims, and (2) the successful drilling of a water well on claim 22 in 1962 and the leasing of claims 1-16 in 1964 at a minimum annual royalty of $12,000 were substantial evidence that material could have been extracted from these claims at a profit prior to July 23, 1955 (App. C, *infra*, pp. 20a-21a, 24a). Accordingly, "at least"

[3] The administrative law judge also held claim 9 valid as a reasonable reserve for claim 10, but the IBLA reversed because there was no independent evidence of marketability regarding claim 9 (App. D, *infra*, pp. 52a-53a).

The administrative law judge found that claims 12A and 13A, which were located after the effective date of the Act of July 23, 1955, were void *ab initio* (App. D, *infra*, pp. 33a, 49a). These findings were affirmed by the Interior Board of Land Appeals and by the district court (App. D, *infra*, p. 49a; App. C, *infra*, p. 25a). Charlestone acknowledged in the court of appeals that the materials on its claims were common varieties and that claims 12A and 13A were therefore invalid (App. A, *infra*, p. 2a n. 1).

claims 1-16 were valid, and access to the water Charlestone had discovered on claim 22 should be permitted (App. C, *infra*, p. 26a).[4]

The court of appeals affirmed with one significant addition: it held that claim 22 was also valid, because Charlestone's well was evidence of its discovery of water, which the court concluded was a locatable mineral. The parties had neither briefed nor argued this question. The court stated that "[s]ince early times, water has been regarded as a mineral," and observed that the federal mining statutes which allow the location of placer claims "do not expressly define water as a non-mineral" (App. A, *infra*, pp. 15a-16a). Because "the successful recovery of many 'hard' minerals from the earth and the utilization of the soft mineral of water therewith go hand in hand," the court declined to assume "that Congress was not aware of the necessary glove of water for the hand of mining * * * [or that] Congress impliedly intended to reserve water from those minerals allowed to be located and recovered" (App. A, *infra*, p. 16a). The court noted that water was not named as one of the common varieties of minerals that were withdrawn from location as of July 23, 1955, so "it is of no importance that the discovery of water within Claim 22 occurred after" that date (App. A, *infra*, pp. 16a-17a). The water on claim 22

[4] The district court offered no legal basis for authorizing access to the water on claim 22, and we are aware of none under federal law. We have no way of knowing whether Charlestone might be able to establish the right to use that water under state law. See pp. 8-10, *infra*.

"undeniably has an intrinsic value in the desert area," although there was "no evidence of a profitable market of the water per se for either domestic or irrigation uses" (App. A, *infra*, p. 17a). Since the water could be used to wash the sand and gravel from Charlestone's other claims, and there was a profitable market for washed sand and gravel, the court held that "Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid" (App. A, *infra*, p. 17a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals announces the startling conclusion that water is a mineral for which claims to public lands may be located and perfected under the federal mining laws. This pronouncement disregards all the precedents of this Court and the administrative tribunals. It is also contrary to the applicable statutes, in which Congress has made clear its intention that acquisition of water rights on public lands is to be governed by state and local laws, not by the federal mining laws.[5]

[5] The decision below is erroneous in another respect. This is one of a series of mining cases in which the Ninth Circuit Court of Appeals, and district courts under its authority, have been upholding mining claims by reweighing the evidence and substituting their judgment for that of the administrative tribunals of the Department of the Interior. See *Verrue* v. *United States*, 457 F.2d 1202 (C.A. 9); *Osborne* v. *Morton*, C.A. 9, No. 72-2290, decided February 22, 1974 (unreported), remanding to the district court "to review the administrative record and reassess the factual conclusion of the Secretary of

In 1866, in the first mining law that opened "mineral lands" owned by the federal government for exploration and occupation, Congress declared that

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the Interior concerning the value of the mineral deposit in the light of *Verrue* v. *United States* * * *"). Thus, the court of appeals here rejected the testimony of the government's sole witness, Fisher, a mining engineer (App. A, *infra*, p. 7a), in part on the ground, following *Verrue*, that his opinion was "unfounded" because he did not have "personal knowledge of the sand and gravel market" in the relevant locality at the crucial date of July 1955 (App. A, *infra*, p. 11a). The court also declared Fisher's testimony to be "flatly contradicted" by other evidence (App. A, *infra*, p. 11a), an appraisal quite different from the judgment the Interior Board of Land Appeals reached (App. D, *infra*, pp. 41a-46a, 53a-58a). Further, while acknowledging that it was the claimant's burden to establish "[a] discovery of a valuable deposit of sand and gravel on each of its claims" (App. A, *infra*, p. 3a), the court of appeals, like the district court, did not examine the evidence to determine the development of each particular claim, but lumped it together and considered it applicable to all the claims—an approach whereby, as the IBLA noted (App. D, *infra*, p. 40a), "a person could locate an entire desert and establish its marketability by selling sand and gravel from a single location." See, *e.g.*, *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336. In particular, the court of appeals failed to note that as to eight or nine of the Charlestone claims, there was no evidence that any sand or gravel had ever been removed (App. D, *infra*, p. 53a).

The Ninth Circuit's standard of judicial review of mining claim decisions, as exemplified in this case, threatens to hamstring the Secretary of the Interior in the discharge of his responsibility to see that only valid mining claims are recognized and that the rights of the public in the public lands are preserved. See *Cameron* v. *United States*, 252 U.S. 450, 459-460. While we do not regard the error in this case as significant enough to warrant seeking review on this ground, we have noted it because, if the trend of decisions it illustrates continues, we may ask the Court to review the issue in another case.

rights which were acquired "by priority of possession" to the use of water on those lands, and which were "recognized and acknowledged by the local customs, laws, and the decisions of courts," were to be "maintained and protected." Section 9 of the Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51. And Section 17 of the Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52, provided that all patents and homesteads on public lands "shall be subject to any vested and accrued water rights" acquired or recognized under the 1866 law. The Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*, which remains the basic law relating to mineral claims, superseded portions of the earlier acts but left these water rights provisions unchanged. As this Court concluded in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155:

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

The Court in that case also considered the effect of Section 1 of the Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. 321, and stated (295 U.S. at 162):

> The fair construction of the provision now under review is that Congress intended to establish the

rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location [emphasis in original].[6]

The court of appeals did not consider any of these statutory provisions. It merely observed that the min-

[6] Section 4 of the Act of July 23, 1955, 69 Stat. 368, as amended, 30 U.S.C. 612, also seems to reflect the congressional understanding that water is not a mineral under the mining laws. Section 4 provides that nothing in that Act, which removed common variety minerals from location under 30 U.S.C. 22 and 35,

> shall be construed as affecting or intended to affect or in any way interfere with or modify the laws * * * [of the western states] relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

ing laws did not expressly define water as a nonmineral (App. A, *infra*, p. 16a).

The administrative decisions of the Department of the Interior have consistently held that water is not a locatable mineral[7] and that the acquisition of water rights is not governed by the federal mining laws. E.g., *Robert L. Beery*, 25 IBLA 287; *Charles Lennig*, 5 L.D. 190; *William A. Chessman*, 2 L.D. 774; *Pagosa Springs*, 1 L.D. 573. After a full review of the prior decisions, the Interior Board of Land Appeals last year concluded in *Robert L. Beery*, which is reprinted as Appendix E, that water could not now be classified as a locatable mineral "[i]f we are to pay more than lip service to the doctrine of stare decisis * * *" (App. E, *infra*, p. 63a).

The court of appeals failed to note these administrative authorities. This Court, however, has said that "great deference" is due to a statutory interpretation adopted by the officers charged with administering the land laws. *Udall* v. *Tallman*, 380

[7] This is so although water may be defined as a mineral for some other purposes. As the IBLA observed in *Robert L. Beery*, 25 IBLA 287 (App. E, *infra*, p. 66a), "[i]f all those substances which are quite literally 'minerals,' such as common dirt, were locatable under the mining law, there could have been no entry under the homestead or other agricultural entry laws, nor any land grants to states and railroads, as all land would then have been 'mineral land.'" As this Court recognized in *Northern Pacific Railway Co.* v. *Soderberg*, 188 U.S. 526, 530, the broadest definition of the word mineral, as in the division of matter into animal, vegetable, and mineral, would be "absurd as applied to a grant of lands, since all lands belong to the mineral kingdom * * *."

U.S. 1, 16; *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336.

The novel holding below, if allowed to stand, will unsettle the law of water rights throughout the western states, drawing into question the validity of private rights long thought to be established. The relevant provisions of federal law, 30 U.S.C. 51 and 52, on their face give effect to water rights recognized and acknowledged under local law. The owner of water rights established by prior appropriation under local law normally enjoys the beneficial use of the water that passes through or under his land. See 5 Clark, *Waters and Water Rights*, §§ 408.1, 423-424, 443 (1972). But if water is a locatable mineral, it is presumably possible to perfect a mining claim to the same water before it reaches the land of the present user, or, in the case of an underground basin, before the water is used by whoever presently has the right to such use.[8] Since the owner of a mining claim takes title to the mineral, his claim to the water might be superior to any preexisting right to the use of the same water under state law.

To construe 30 U.S.C. 22 as permitting the location of a mineral claim to water thus seems to put that statute in conflict with 30 U.S.C. 51 and 52. Section 51 states that water rights gained by prior appropriation and acknowledged under state law are

[8] While the water on claim 22 was ground water, the court's reasoning would appear to apply to water generally, including surface water. This is, however, one of the questions raised and left open by the decision below.

to be "maintained and protected." Section 52 provides that the grantee of a federal patent takes subject to preexisting water rights established under state law—a provision difficult to apply, it would seem, to a federal patent itself based on a claim to water as a valuable mineral.

The innovation by the court of appeals thus is likely to spawn extensive litigation between rival claimants to water rights, under the federal mining laws on the one hand and state doctrines of prior appropriation on the other.

Moreover, allowing mining claims to a substance as common and accessible as water—but not one of the "common variety" minerals withdrawn from location by the Act of July 23, 1955—would permit private acquisitions from the public lands without the commensurate public gain that results from the exploitation of substances traditionally classed as valuable minerals under the mining laws. And since mining claims, like those in this case, need not specify the mineral discovered, invalid claims originally premised on the discovery of some other mineral could be validated by a showing that water is present (as the court of appeals did with claim 22 in this case.)[9] Indeed, since the court here relied on the

[9] The court did not discuss whether water is to be located as a lode or placer claim. Although this case involved a placer claim, an argument can be made that water would fall more logically within the definition of a lode claim. See *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673; *Fuller* v. *Mountain Sculpture, Inc.*, 6 Utah 2d 385, 314 P.2d 842. In the case of a lode claim, the claimant normally has the right to

intrinsic value of water in a desert region to show marketability, it may be that any claimant who can show the presence of water may appropriate public lands in the arid western states. Such a result would be contrary to the intention of Congress as expressed in the Desert Land Act of 1877 and in the other legislation we have noted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1977.

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follow the vein or the lode outside of his claim. 30 U.S.C. 26. Thus it might be possible by a single lode claim for a claimant to gain ownership of all the ground water in a basin or of an entire stream.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-1532

[Filed May 12, 1977]

CHARLESTONE STONE PRODUCTS CO., INC.,
a corporation, PLAINTIFF-APPELLEE

v.

CECIL D. ANDRUS, Secretary of the Interior,*
UNITED STATES OF AMERICA,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
For the District of Nevada

Before: TRASK and GOODWIN, Circuit Judges,
and EAST,** District Judge

EAST, Senior District Judge:

The Cause:

Cecil D. Andrus, for the defendants-appellants, as Secretary of Interior, (Secretary) appeals the judgment of the District Court holding valid and granting

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* Rogers C. B. Morton, as Secretary of Interior, was the originally named Secretary. We note the name of his present successor in office.

** Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

access to certain placer sand and gravel mining claims located in the Las Vegas Valley in Nevada. We affirm.

The Secretary of November 17, 1965 initiated a contest complaint against the plaintiff-appellee Charlestone Stone Products Co., Inc. (Charlestone), attacking the validity of Charlestone's placer mining locations for sand and gravel numbered 1 through 22 and numbered 12A and 13A.[1] The Administrative Law Judge found Claims 9 and 10 to be valid. On cross-appeals, however, the Secretary's Board of Land Appeals (Board) found only Claim 10 to be valid. Upon judicial review, the District Court, believing an injustice had been accomplished, held that "at least the claims 1 through 16" were valid. It also held that Charlestone should be granted access to Claim 22 in order to utilize, in the operations of the valid claims, the water produced from a well driven on Claim 22.

Issues on Review:

While the Secretary asserts the issues on review in different terms, we deem the pertinent issues to be:

(1) Whether, upon construing the record as a whole, the Secretary's finding that only Claim 10 was valid is supported by substantial evidence. *Multiple Use, Inc.* v. *Morton*, 504 F.2d 448, 452 (9th Cir. 1974); *White* v. *Udall*, 404 F.2d 334, 335 (9th Cir.

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[1] Claims numbered 12A and 13A located after the year 1955 are not in issue.

1968); and *Henrikson* v. *Udall*, 350 F.2d 949, 950 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966).

(2) Whether Charlestone met the two prong test of establishing: (a) A discovery of a valuable deposit of sand and gravel on each of its claims; and (b) The intrinsic value of the sand and gravel deposits was such as "would justify a person of reasonable prudence in making further expenditures upon the property with a reasonable prospect of success in developing a valuable mine.[2] *United States* v. *Coleman*, 390 U.S. 599 . . . (1968)." *Clear Gravel Enterprises, Inc.* v. *Keil*, 505 F.2d 180 (9th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975); and *Verrue* v. *United States*, 457 F.2d 1202, 1203 (9th Cir. 1972). "The reasonably prudent man we are concerned with is the miner who has made his discovery and not the prospector who is still looking. *Humboldt Placer Mining Co.* v. *Secretary of Interior*, No. 74-2762, p. 3 (9th Cir. Jan. 6, 1977).

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[2] That is, whether the sand and gravel "in question could be extracted, removed and marketed at a profit on . . . July 23, 1955 when common variety sand and gravel deposits as here involved became no longer locatable. 30 U.S.C. § 611. *United States* v. *Barrows*, 404 F.2d 749 (9th Cir., 1968), *cert. denied*, 394 U.S. 974 . . . (1969)." *Clear Gravel Enterprises, supra* at 180-81.

Section 611, in its pertinent parts, reads: "No deposit of common varieties of sand, stone, gravel . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit."

Filing and Operations of Claims:

Pursuant to the existing statute, A. M. Murphy and Fred Pine (Murphy) filed placer mining claims numbered 1 through 22 on February 18, 1942 in a surface water wash of the Las Vegas Valley some 15 miles distant from the then center of the city of Las Vegas. The aggregate acreage of the several claims approximated 450 acres and contained a later estimated 20 million cubic yards of sand and gravel.

The evidentiary record is replete with eyewitness testimony that the sand and gravel contained in the area of the claims was of excellent quality for various construction uses and had values as such.

Shortly after the location and filing of the claims, Murphy's assignee, Southern Nevada Industries, Inc. (Southern), began operation within the confines of the claims and removed some 100,000 yards of material from a number of places up and down the wash. Due to the absence of washing water, Southern transported the raw materials to a site some five miles distant for crushing, screening, and washing. The refined material was used in the construction of an air force base situated northeast of Las Vegas. Southern closed the operation in 1943 and moved to an area near Henderson, Nevada for participation in a World War II construction project in that area. Thereafter, during the remainder of World War II and its aftermath, private construction in the area was curtailed.

From September, 1954 until during the year 1957, one E. H. Brawner (Brawner), as lessee of the claims, operated under a royalty agreement of not

less than $200 per month. It is undisputed that at this time Brawner's sand and gravel operation was farther from Las Vegas than were the operations of his competitors. Brawner's operation was also hampered to some extent by the absence of a water supply. Nevertheless he continued to operate the crushing plant within the limits of Claim 10 and materials were extracted from the crusher area and "pit" located within that claim and from other claims in the canyon. The market demand for the various types of sand and gravel, together with the lay of the various materials, dictated the location of the extractions. Brawner made profitable sales of the extracted materials through the year 1957.

The foregoing narration carries the operation on the claims through the critical pre-July 23, 1955 discovery period.[3] The following narration of operations subsequent to July 23, 1955 is pertinent, first, to the extent that the facts might bear upon the proper application, at the time of the contest proceedings, of the two prong "value" and "prudent man" or marketability test enunciated above; and, secondly, to the continuity of the marketability of the extracted materials.

On April 9, 1959, Frank R. Sullivan obtained title to the claims, extracted materials which were later stockpiled on the property, and sold some of the material as roofing granules.

On January 5, 1960, Charlestone acquired title to the claims and during 1961 Morrison-Knudsen, Inc.,

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[3] See note 2, *supra*.

as lessee, entered the claims, constructed a screening plant within the confines of Claim 10 and carried on processing operations. Unsuccessful efforts were made to drill screening water wells within Claims 9 and 10, and in 1962, at the cost of some $3,000, a well supplying adequate washing water was located within Claim 22. On July 15, 1964, Charlestone leased Claims 1 through 16 to Arden Sand and Gravel Co. (Arden) for a period of five years with an annual royalty of $12,000. Although Charlestone retained Claims 17 through 22, it agreed to furnish Arden with electrical power and washing water from the well within Claim 22.

Action of the Secretary:

During the summer of 1956 while the Brawner operations were in progress, the United States Bureau of Land Management in Nevada employed Messrs. Hill and Lovejoy (Hill), competent engineers and surveyors, to investigate the validity of the instant claims. Hill reported that Claims 1 through 22 encompassed a valuable discovery of sand and gravel deposits and were valid. The report constituted a comprehensive and informative discussion of the factors bearing upon a determination of marketability of sand and gravel deposits and of the quality of particular sand and gravel deposits as of July 23, 1955. After submission of the Hill report, the Bureau of Land Management affirmed the validity of the Brawner claims and removed the area of the claims from an open small tract classification.

Nine years later the Secretary employed Donald G. Fisher (Fisher),[4] a mining engineer, to investigate and report on the validity of the Charlestone claims. Fisher gathered hearsay information from competing sand and gravel operators in the area and made a visual examination of the claims in 1965, some ten years after the crucial date of July 23, 1955. Based upon his investigation, Fisher opined that *all* of the Charlestone claims were invalid for want of a discovery. The Secretary then used the Fisher report as a basis for the contest proceedings.

Administrative Proceedings:

Fisher was the Secretary's sole witness and his testimony comprised the only evidence in support of the contest. Fisher testified to the effect that his opinion was based upon information gained as a result of visual examination of apparent extractions from each of the claims in 1965 and again in 1969; review of all mineral reports, as well as the Hill report; and interviews with local sand and gravel dealers, including the present owners and the past operators of the claims. Further, he testified that his opinion was also based upon his familiarity with the Las Vegas area, where he had previously been employed by the Government in making validity determinations and market studies in mining contest cases. Fisher, using his version of the test of discovery, opined that "this was

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[4] Fisher had been previously employed by the Secretary in connection with other contests of sand and gravel claims within the Las Vegas vicinity.

a very sporadic operation . . . [I]t didn't appear to be an operation that could sustain a continuous operation over the years" and the claims were invalid for want of discovery. In his opinion, the crucial factors in the invalidity of the claims were the excessive distance of the claims from a market and the lack of washing facilities.

To rebut Fisher's testimony, Charlestone produced the deposition testimony of Hill. Hill's testimony reaffirmed the conclusion in his 1956 report that all of the claims were valid. He testified that his opinion of validity was based upon a personal inspection of the claims, an investigation of the actual history of the operation of the claims, and his knowledge of the marketability of the product resulting from the thorough study he had made in conjunction with Mr. Lovejoy.

Charlestone buttressed Hill's conclusions with the eyewitness testimony of several workers who had been employed at the extraction operations by Southern and Brawner.[5]

The decisions of the Administrative Law Judge and the Board reflect that each gave substantial weight to Fisher's testimony. At the conclusion of the hearing, the Administrative Law Judge found only two of the

[5] The record establishes actual sales from the claim sites and constitutes an even stronger showing of marketability than was made in either *Melluzzo* v. *Morton*, 534 F.2d 860 (9th Cir. 1976), or *Verrue, supra*. In those cases, this Court, notwithstanding a total absence of sales from the claim sites, reversed decisions of the Secretary that certain sand and gravel claims were invalid.

22 claims to be valid. On administrative review, the Board, placing even more credence on Fisher's opinion, found only one of the claims to be valid. Charlestone ultimately and successfully sought review of the latter decision in the District Court.

Discussion and Disposition:

Issue 1:

We conclude that the Board's exclusion of validity of Charlestone's claims, except as to Claim 10, is not supported by substantial evidence.

Our conclusion is, first, guided by the course set in *Walker* v. *Mathews*, 546 F.2d 814, 818 (9th Cir. 1976):

> "Substantial evidence means that a finding is supported by '"more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."' (*Richardson* v. *Perales* (1971) 402 U.S. 389, 401 . . .) In applying the substantial evidence test we are obligated to look at the record as a whole[6] and not merely at the evidence tending to support a finding."

Footnote 6 reads:

> "*See, Day* v. *Weinberger* (9th Cir. 1975) 522 F.2d 1154, 1156 ('But in determining whether there is substantial evidence to support the examiner's finding a reviewing court must consider both evidence that supports, and evidence that detracts from, the examiner's conclusion. We cannot affirm the examiner's conclusion simply

by isolating a specific quantum of supporting evidence.'); Davis, 4 Administrative Law Treatise § 29.03 (1958) ('". . . Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence."'); and *Universal Camera Corp.* v. *N.L.R.B.* (1951) 340 U.S. 474, 487-88 . . . ."

Secondly, "opinions not supported by facts, and which are contrary to the physical facts and do violence to scientific principle or reason, are robbed of all probative value." *Weinberg* v. *Northern Pac. Ry. Co.*, 150 F.2d 645, 651 (8th Cir. 1945). *See Anderson* v. *Knox*, 297 F.2d 702, 719-20 (9th Cir. 1961); *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172, 178 & n.15 (9th Cir. 1950); and *United States* v. *102.93 Acres of Land, Etc.*, 154 F. Supp. 258 (E.D. N.Y. 1957), *aff'd sub nom. United States* v. *Fox*, 257 F.2d 805 (2d Cir. 1958).

Finally, this Court has in the past refused to credit the testimony of Government witnesses on facts similar to those in the case at bar. In *Verrue*, *supra*, this Court affirmed the District Court's reversal of the Secretary's decision invalidating a sand and gravel mining claim for lack of discovery of a valuable mineral deposit. In reaching this conclusion, the Court noted that the crucial issue was marketability and that the testimony of the three Government witnesses "sheds no light on that issue" because none of them had been in the area of the mining claim during the crucial period "nor did any one of them have personal

knowledge of the sand and gravel market during that time." *Id.* at 1204.

Fisher's opinion, on which the Secretary exclusively relies, neither avoids the inadequacies noted in *Verrue*, *supra*, nor is it supported by the other facts in the record. It was based upon an investigation begun more than ten years after the close of the crucial period. Although he stated he was familiar with the Las Vegas area, there was no indication that he was familiar with that area during the crucial period. In addition, his opinion was not based upon personal knowledge of the sand and gravel market during that period. Rather, he gleaned his information solely from a visual inspection of the terrain, a review of reports and interviews with others, all conducted more than ten years after the crucial period. More importantly, his opinion was flatly contradicted by the Hill report which was based upon an investigation completed within one year of the crucial period and also by direct evidence of marketability supplied by persons who had actually witnessed substantial recoveries from the claims up and down the valley or wash. In light of these factors, we must conclude that the Board improperly credited Fisher's unfounded opinion of nonvalidity.

Issue 2-(a):

A discovery of valuable sand and gravel deposits on Claims 1 through 22, containing workable deposits of sand and gravel of like character and quality with

the material in Claim 10, is clearly established by the record.

Issue 2-(b):

The marketability of the pre-July 23, 1955 extractions can be tested by reason of: (1) Accessibility to the claims; (2) Bona fides of the operators in developing the claims; (3) Existence of market demand within reasonable proximity to the claims; and (4) Actual participation in the market. *See Clear Gravel Enterprises, supra* at 181.[6]

The relevant evidence in the record establishes that:

(1) Accessibility of Charlestone's Claims 1 through 22 was readily available. The area of the wash was not remote but, to the contrary, readily available to major public roads;

(2) Charlestone's predecessors in interest made a bona fide development and recovery of various grades of sand and gravel from

[6] Contrast with the holding in *Humbold Placer Mining Company* v. *Secretary*, No. 74-2762 at p. 6 (9th Cir. Jan. 6, 1977), where this Court reemphasized its holding in *Verrue, supra*, that " 'positive evidence in the record of marketability' was not offset by evidence of the lack of sales of material and the availability of comparable material from other sources.[2]"

Footnote 2 reads: "*In Melluzzo* v. *Morton*, 534 F.2d 860, 863 (9th Cir. 1976), we construed *Verrue* as 'holding that lack or insubstantiality of sales of material from the claims in question is relevant to the question of marketability. It is not, however, conclusive proof of lack of value. The inference to that effect, when all evidence is considered, can be found to have been overcome by evidence of marketability.' "

within the several claims during the pre-July 23, 1955 period;

(3) Market demand existed for the extracted grades of sand and gravel within reasonable proximity to the various claims; and

(4) The predecessors actually sold the recovered material in that market.

The evaluation as to whether Charlestone met tests (3) and (4) deserves further comment. Fisher's opinion of nonvalidity was based primarily upon: (a) An absence of washing water; (b) The sporadic operations of Southern and Brawner; and (c) The prohibitive distance of the claims from the market. We are convinced that each of those reservations was nullified by the only relevant evidence in the record.

The evidence established that Southern and Brawner did actually recover sand and gravel from the claims, transported those extractions for washing and sold the same on the market.

The seemingly sporadic operations by Southern and Brawner were a mirror of the building and construction industry in the Las Vegas area during and shortly after World War II. Continuous operation of a placer mining claim is not a per se requisite to proving the validity of that claim. Cessation of operation of any economic enterprise may be caused by innumerable factors totally beyond the bona fide intentions of the operator. Reason dictates that periodic cessation of operation of a placer mining claim, short of an intentional abandonment of the claim, need not defeat ultimate proof of validity.

Since a total absence of operation does not preclude a finding of validity (*Verrue*, *supra*), it follows that sporadic operation does not preclude a finding for validity. The Secretary does not contend there was a pre-July 23, 1955 abandonment of the claims by Brawner. In fact, as of July 23, 1955, Brawner was engaged in the profitable extraction of sand and gravel from the various claims.

The Fisher postulate of an excessive distance of the claims from the market is meaningless. Some competitors in the sand and gravel business are next door to a construction project; yet a distant competitor underbids and successfully competes with the next door neighbor. The inescapable fact is that market demand supported the recovery and sale of material from the claims.

The prudent person test has enough flexibility to allow a sand and gravel business operator to undertake an apparently marginal enterprise if it has a reasonable possibility of success. Relying on Fisher's opinion, the Secretary deemed Brawner to have been a foolhardy operator; yet in many circles, pre-July 23, 1955 Las Vegas area entrepreneurs would have been deemed astute.

Finally, we conclude that the District Court's finding that "at least the claims numbered 1 through 16 have been proved valid" is not clearly erroneous. Fed. R. Civ. P. 52(a).

Furthermore we agree with the District Court's conclusion that Charlestone must be permitted access to Claim 22 in order to utilize the water recovered

from the well in the operation of the other valid claims. However, we reach our conclusion upon a rationale other than that relied upon by the District Court.

It is agreed that the Murphy location notices were lawfully filed under the Acts of Congress. Each of the location notices, covering Claims 1 through 22, described a "piece of mineral bearing ground as a Placer claim" as distinguished from a claim location of any particular mineral, either surface or underground, within that tract of ground. "A placer location is the location in accordance with those acts [of Congress] of a tract of land for the mineral bearing or other valuable deposits upon or within it that are not found in lodes or veins in rock in place." *Webb* v. *American Asphaltum Min. Co.*, 157 F. 203, 204 (8th Cir. 1907). *See also* 1 American Law of Mining § 5.10 (1976).

We are satisfied that Charlestone, as Murphy's successor, had the right to appropriate and utilize as a mineral the water within any of the claims which met the above two prong test of value and success in development. It has been said that " 'Mineral' is a word of general language, and not *per se* a term of art. . . . It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular . . . statute." *Bumpus* v. *United States*, 325 F.2d 264, 266 (10th Cir. 1963).

Since early times, water has been regarded as a mineral. "[T]he term 'mineral' has been held to em-

brace water, particularly subterranean water, irrespective of the character and quantity of salts and gases which may be in solution." 58 C.J.S. *Mines & Minerals* § 2(7) (1948). (Footnotes omitted). Water itself may be classified as a mineral. *United States* v. *Union Oil Co. of California*, No. 74-1574, p. 3 (9th Cir. Jan. 31, 1977).

The pertinent Acts of Congress which allow a prospector to enter and patent placer claims for valuable minerals do not expressly define water as a non-mineral. In *Union Oil Co.*, *supra* at 3, this Court hazards that "Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act in 1916; it had no specific intention either to reserve geothermal resources or to pass title to [the Stock-raisers]." It is common knowledge that the successful recovery of many "hard" minerals from the earth and the utilization of the soft mineral of water therewith go hand in hand. 1 American Law of Mining § 2.71 (1976). Therefore, it would be incongruous for us to hazard that Congress was not aware of the necessary glove of water for the hand of mining and therefrom Congress impliedly intended to reserve water from those minerals allowed to be located and recovered. In any event we decline to do so.

The limitation in 30 U.S.C. § 611 on the location of claims for common varieties of certain named minerals does not apply to water. In fact, the express language of § 611 exempts from its operation "some other mineral occurring in or in association with such

deposit." Therefore, it is of no importance that the discovery of water within Claim 22 occurred after July 23, 1955.

The water recovered from the source under Claim 22 [7] undeniably has an intrinsic value in the desert area. There is by the nature of Charlestone's operations no evidence of a profitable market of the water per se for either domestic or irrigation uses. Nevertheless the only relevant evidence in the record demonstrates the existence of a profitable market of the water as a washing agent for the sand and gravel recovered from the valid claims. Although unwashed sand and gravel has a limited market, good quality sand and gravel in combination with water draws a premium market.

We are satisfied that Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid.

The judgment of the District Court entered on November 8, 1974, vacating the decision of the Board dated January 18, 1973 and remanding the cause to the Secretary is affirmed, and the cause is remanded to the District Court for further order of remand to the Secretary consistent with the foregoing.

AFFIRMED AND REMANDED.

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[7] The District Court noted that the source of water under Claim 22 was present on the date of Murphy's notice of location.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DC # CIV LV-2039 BRT

No. 75-1532

CHARLESTONE STONE PRODUCTS CO., INC.,
PLAINTIFF-APPELLEE

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of said District Court in the Cause be, and hereby is affirmed and remanded.

Filed and entered May 12, 1977.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. LV-2039 BRT

CHARLESTONE STONE PRODUCTS CO., INC., PLAINTIFF

vs.

ROGERS C. B. MORTON, DEFENDANT

MEMORANDUM OPINION

This contest of a group of twenty-four placer mining claims was initiated by a contest complaint filed in the Nevada Land Office, Bureau of Land Management, on November 12, 1965. The contest attacks the validity of placer mining locations for sand and gravel known as Charlestone Claims numbered 1 through 22, No. 12A and No. 13A. After hearings and appeals in the administrative agency, the final decision of the Interior Board of Land Appeals, dated January 18, 1973 (9 IBLA 94), was to the effect that only Charlestone No. 10 placer claim is valid and that all the other claims are invalid. Reference is made to the decision of the Interior Board of Land Appeals for most of the facts pertaining to the property and to the proceedings.

After reviewing the entire record in this case, we believe that the only reasonable conclusion is that the decision is wrong and that an injustice has been done. The difficulty presented is in applying established law with respect to the scope of administrative review and established law concerning the validity of mining claims for sand and gravel to the undisputed facts in this case in order to achieve a just result.

First, it should be noted that throughout the administrative proceedings, at least one of the mining claims has been found to be unquestionably valid. The Administrative Law Judge found both Claim No. 9 and Claim No. 10 to be valid. The Interior Board of Land Appeals, on cross-appeals by the Government and the contestee, found only Claim No. 10 to be valid. The importance of this is that there is no dispute with respect to the mineral character of the deposit at and prior to July 23, 1955 when Congress removed common varieties of sand and gravel from location under the mining laws. It is also undisputed that all the twenty-four claims contain workable deposits of sand and gravel of like character and quality with the material in Claim No. 10. All but one of the claims was held invalid only because the material from all the claims could not be shown to be marketable at one time or within the near future.

The case for the Government before the Administrative Law Judge was rested on the testimony of Donald G. Fisher, a qualified mining engineer, whose opinion that all the claims were invalid was obviously of little weight because he was not thoroughly fa-

miliar with the history of the claims and the mining activity on the claims and had little or no knowledge of the economics of the market respecting sand and gravel in the Las Vegas Valley where the claims were located. He based his opinion of invalidity on his knowledge of the history of the market respecting sand and gravel in the Las Vegas Valley where the claims were located. He based his opinion of invalidity on his knowledge of the history of the claims, which the direct evidence produced by the contestee proved to be incorrect, and upon his opinion that "this was a very sporadic operation * * * it didn't appear to be an operation that could sustain a continuous operation over the years." We know of no established principle of mining law which would support these as reasons for invalidating a mining location under the established prudent man and marketability tests. There is no requirement that an operation must be continuous or sustained. The weakness of this type of evidence has been recognized by the Ninth Circuit in *Verrue* v. *United States*, 457 F. 2d 1202 (9th Cir. 1972), and by the Interior Board of Land Appeals in *United States* v. *Gibbs*, decided November 21, 1973 (13 IBLA 382).

This case is unique, as compared with other sand and gravel mining claim cases which have come to the attention of this Court, in the fact that in the Summer of 1956, two qualified engineers, Starr Hill, Jr. and Earl M. D. Lovejoy, employed by the Bureau of Land Management in Nevada were assigned to make a study and report on sand and gravel market-

ability in Las Vegas Valley, Nevada. The report was completed in November of 1956 and constitutes a comprehensive and informative discussion of the factors bearing upon a determination of marketability of sand and gravel deposits and of the quality of particular sand and gravel deposits, including the Charlestone claims, approximately as of the time the Act of Congress prohibited further location of these materials under the mining laws. At that time, the instant claims were being mined by the E. J. Brawner Sand & Gravel Co. under lease, which company was producing suitable material for the manufacture of concrete pipe, plaster and masonry sand. The deposition of Starr Hill, Jr. was taken in the instant contest proceedings on October 21, 1969, and Mr. Hill stated that it was his opinion at the time of his report that the Charlestone claims were valid mining claims, taking into consideration all the criteria applicable to such a determination. His opinion was based upon an actual physical inspection of the claims, an investigation of the history of the operation of the claims since they were located in 1942, and his knowledge of the marketability of the product resulting from the thorough study he had made in conjunction with Mr. Lovejoy. This is by far the most credible evidence in the record respecting the quality and marketability of the deposit. The evidence shows that with respect to quality, the deposit of sand and gravel in the Charlestone claims is the best in the Las Vegas Valley.

The Brawner company operated under its lease until 1959. In 1960, the contestee acquired the claims,

and in 1961, Morrison-Knudsen Company produced coarse aggregates from the claims but other production was hampered because of lack of water. Earlier unsuccessful efforts had been made to drill wells on Claim No. 9 and Claim No. 10. In 1962, the contestee was successful in obtaining a producing well on Claim No. 22. On July 15, 1964, Charlestone Stone Products, Inc., the contestee, entered into a lease with Arden Sand & Gravel Co., Inc. conveying claims numbered 1 to 16, inclusive, for a period of five years with an option to renew for an additional period of five years on the basis of a production royalty per yard but subject to a minimum royalty of $12,000 per year, payable in quarterly installments. The lease also provided for the lessor to install a power line to the claims and to make water available to the lessee from the well on Claim No. 22. It is notable that this lease was entered into before the Government contest was initiated and after the Bureau of Land Management had affirmed the validity of the claims (Ex. J) upon inquiry from the Nevada Department of Water Resources. In fact, the record shows that after the November 1956 report made by Hill and Lovejoy, the Bureau of Land Management had considered the Charlestone claims to be valid and had removed the area of the claims from a small tract classification which had theretofore been made.

There is nothing in the evidence which would support even a suspicion that the agreement entered into on July 15, 1964 between Charlestone Stone Products, Inc. and Arden Sand & Gravel Co., Inc. was anything

but a genuine agreement. It provided for the conveyance for a term of years of sixteen of the claims in question at a guaranteed minimum royalty of $12,000 per year. Any inference that the agreement was fictitious or "window dressing" was dispelled by the fact that it conveyed only sixteen claims and the lessor retained claims numbered 17, 18, 19, 20, 21 and 22 (which had the well) for its own operations. If this had been a fictitious agreement entered into in anticipation of a Government contest of the claims, such deviousness would have suggested a lease of all the claims. In fact, there is no suggestion anywhere in the record, in the findings of the Administrative Law Judge, or in the findings of the Interior Board of Land Appeals that this is anything but a genuine agreement. Of course, performance of the agreement was frustrated when the Government saw fit to initiate the contest proceedings in November of 1965, basing its contest solely on the uncorroborated and relatively weightless opinion evidence of Mr. Fisher.

The success of the contestee in obtaining a well on Claim No. 22 and the agreement entered into on July 15, 1964 are substantial evidence that the owners of the claims could have sold and extracted material from these claims at a profit prior to July 23, 1955. There is no reason to suppose that the same well could not have been obtained in 1954 and the finding of a water supply was a major circumstance justifying an investment of from $200,000 to $300,000 for a large operation. See: *United States* v. *Gibbs*, *supra*.

This is the first case this Court has encountered in which present marketability of the deposit has been established by proof of a genuine agreement for lease of the deposit with a substantial guaranteed minimum royalty. The existence of these facts, however, seem to be well-nigh irrefutable proof of marketability. The Administrative Law Judge and the Interior Board of Land Appeals ignored this evidence. In this respect, the final action of the administrative agency was arbitrary and capricious and not supported by the evidence. We see no rationality in a conclusion that proof of marketability can be established only by direct sales from the property in small quantities.

Operations under the agreement dated July 15, 1964 were frustrated by the initiation of the contest proceedings which made it imprudent to invest $200,000 or more in a plant which was anticipated in order to implement the operations under the lease. Of course, the lessor and lessee had no way of anticipating that final determination of the rights of the parties in the administrative proceedings would consume some eight years.

The decision of the Administrative Law Judge and the Interior Board of Land Appeals with respect to claims numbered 12A and 13A is obviously correct. These locations are invalid because made after July 23, 1955, and the finding that the material is a common variety of sand and gravel is supported by the evidence despite the fact, as we have already observed, that this is the best deposit with respect to quality in the Las Vegas Valley.

A few observations may be pertinent with respect to the quantities of the material in this deposit. The Hill and Lovejoy report estimated reserves of 20,000,000 cubic yards. That report also makes it clear, however, that the method of mining is an important factor with respect to cost. The surface material may be bulldozed—the cheapest method. If a pit is excavated, more expensive equipment and more personnel to operate a shovel and trucks are required. Although there is evidence in the record that at least in some locations the deposit of quality sand and gravel may exist in depth in excess of two hundred feet, it does not follow as a matter of course that sand and gravel at that depth could be economically mined in an open pit operation. Mining at that depth is obviously much more expensive; also hazardous. There is no evidence in the record from which the quantity of reserve material which can be economically mined can be reliably estimated and it is pure guesswork and speculation for the Government to limit the claims validated to No. 10 or No. 10 and No. 9.

It is the opinion of this Court that at least the claims numbered 1 through 16 have been proved valid and that access to Claim No. 22 must be permitted so that the water produced from the well on that claim may be made available to the operations on the valid claims.

The decision of the Interior Board of Land Appeals dated January 18, 1973 is vacated and set aside and this matter is remanded to the Department of the

Interior for further proceedings consistent with this Memorandum Opinion.

Dated: November 7, 1974.

/s/ Bruce R. Thompson
United States District Judge

APPENDIX D

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals
Interior Board of Land Appeals

4015 Wilson Boulevard
Arlington, Virginia 22203

UNITED STATES

v.

CHARLESTONE STONE PRODUCTS, INC.

IBLA 71-111 Decided January 18, 1973

Appeals from decision of Administrative Law Judge Graydon E. Holt in mining contests Nevada 065729 A to Q, inclusive, and Nevada 065731 A & B.

Decision affirmed in part, reversed in part.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

To satisfy the requirements for discovery on a placer mining claim located for a common variety of sand and gravel prior to July 23, 1955, it must be shown that the exposed material could have been extracted, removed and marketed at a profit on that date, and further that the market for

the material from the claim has continued without substantial interruption to the present time; where such a showing is made, a contest against that claim is properly dismissed.

A placer mining claim located for a common variety sand and gravel prior to July 23, 1955, from which claim mineral material was extracted, removed and marketed at a profit on that date, and which mineral material could have participated in the same market without interruption to the present time, is properly declared to be a valid mining claim.

Mining Claims: Common Varieties of Materials: Generally

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date. Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, is insufficient to show that material from this par-

ticular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date, and where claimants fail to make such a showing the claim is properly declared null and void.

Mining Claims: Contests—Mining Claims: Determination of Validity

To establish a prima facie case and to meet its burden of proof in a mining contest, the government is required only to show by competent evidence that there has been no discovery of a valuable mineral deposit.

Mining Claims: Common Varieties of Minerals: Generally

Deposits of high quality sand and gravel, suitable for use without expensive processing, but the market for which is limited to use for road base, asphalt mix, concrete aggregate and rock chips, the same purposes for which other widely available, but less desirable, deposits are marketed at the same price, are common varieties of sand and gravel not locatable since these facts do not

give them a special, distinct value as defined in the Act of July 23, 1955.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity

Where a placer mining claim was located for common variety sand and gravel prior to July 23, 1955, and sand and gravel was mined, removed and marketed at a profit before and on July 23, 1955, it is proper to consider the claim as having demonstrated a present marketability as of that date.

APPEARANCES: W. C. Lamoreaux, Esq., Salt Lake City, Utah, and E. A. Hollingsworth, Esq., Las Vegas, Nevada, for the contestee; Otto Aho, Esq., Field Solicitor, United State Department of the Interior, Reno, Nevada, for the contestant.

OPINION BY MR. HENRIQUES

Contestee appeals from the decision of Administrative Law Judge Graydon E. Holt [1] declaring null and void its Charleston, Charleston Nos. 1-8, 11-12, and Charleston 12A and 13A placer mining claims. Contestant appeals from the decision of the Judge declaring valid Charleston Nos. 9 and 10 placer mining claims.

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[1] The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

The contest was initiated by the filing of a complaint in the Nevada Land Office, Bureau of Land Management, on November 12, 1965. In the complaint, the contestant alleged that:

1. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.
2. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present could not be marketed at a profit prior to the Act of July 23, 1955.

The contestee filed an answer controverting these allegations and a hearing was held before an Administrative Law Judge on October 28 and 29, 1969, at which time both sides presented supportive testimony and submitted various evidentiary exhibits. On October 30, 1970, the Judge handed down his decision from which both sides have taken an appeal. The crucial determinations of the Judge were as follows:

1. That the claims embraced a common variety of sand and gravel, such as was removed from mineral location by the Act of July 23, 1955;
2. That marketability as of July 23, 1955, was shown only as relates to Charleston Claim No. 10;
4. That all other claims were null and void for the lack of a valid discovery.

Before discussing the many points raised on appeal it would be helpful to examine the historical background of the claims in question. The Judge very succinctly stated the history of the claims and his statements, set out below, are hereby adopted:

> The Charleston and Charleston Nos. 1-22 placer claims were located February 18, 1942, by A. M. Murphy and Fred Pine. They quitclaimed the claims to Frank R. Sullivan on April 9, 1959, and he quitclaimed the claims to the Charleston Stone Products, Inc., on January 4, 1960. The Charleston Nos. 12A and 13A were located on September 15, 1961, by the contestee-corporation. The claims embrace a massive sand and gravel deposit in a canyon extending from west to east over a distance of four miles. The descending gradient of the canyon floor is approximately 375 feet per mile eastward. The center of the claims is 15 miles northwest of Las Vegas, Nevada, and they are accessible to the city by road. The quality of the sand and gravel is excellent for such uses as road bases, concrete and plaster aggregate, and leach rock. The quantity has not been determined but the parties were in substantial agreement that there is [*sic*] at least 20,000,000 cubic yards of material and probably a great deal more.
>
> Prior to 1940 Las Vegas was a relatively small community and much of the land surrounding the city was public land. During that period whenever a builder or contractor wanted small quanti-

ties of sand or gravel he merely took the material from the most convenient location on the public land. The material on the Charleston group of claims was used in this manner for many years when there was a construction project in the area. In recent years the city has become an industrial complex and much of the surrounding public land has been disposed of under various land laws and regulations. Because of this loss there is now a limited number of sites on remaining public land to secure quality sand and gravel. The land on which the Charleston claims are located was at one time reserved for small tract classification by the Bureau of Land Management. Later the Bureau determined that the canyon was subject to flash floods and was not suitable for small tracts. The Bureau then revoked the classification. There was no suggestion that the land within the claims is valuable for a purpose other than for the mining of sand and gravel.

Shortly after the claims were located in 1942, they were leased to Southern Nevada Industries, Inc. This company used the sand and gravel at first to make concrete blocks and later for the construction of the runways at Nellis Air Force Base, a short distance north of Las Vegas. The company had the material trucked to their plant some 10 miles north of the city. In the plant it was crushed, screened and washed. Mr. R. J. Kaltenborn, President of the company at the

time, testified that the company removed from 75 to 100 thousand cubic yards of material at 5 cents a yard royalty during 1942 and 1943. In the latter part of 1943 the company opened a pit near Henderson, 13 miles southeast of Las Vegas, and discontinued using materials from the claims.

The next major user of the claims was E. H. Brawner. Mr. Brawner leased the claims on Septemper 18, 1954, for a five-year period and agreed to pay a royalty of 10 cents a cubic yard for material removed but not less than $200 per month (Exh. X-5). A number of witnesses recalled the Brawner operation on the claims between 1954 and 1958 and described his activities in considerable detail. Probably the most accurate description can be found in the deposition of Starr Hill, Jr. In 1956 Mr. Hill and Earl M. P. Lovejoy, as mining engineers for the Bureau of Land Management, made a marketability study of the sand and gravel industry in the Las Vegas Valley. Their report is dated November 1956 (Deposition Exh. A).

Mr. Hill testified that he and Mr. Lovejoy observed the Brawner operation in September and October 1956. The equipment consisted of a crusher and grader which was located in a large pit on Claims 9 and 10. At that time Mr. Brawner had produced 15,000 yards from the pit for use as plaster and masonry sand, concrete blocks and conduit pipe aggregates. The Stocks Mill and Supply Company was the major purchaser of the

material. Mr. Hill described the deposit and expressed the belief that it was the best material he had seen in the valley from the standpoint of quality and quantity. The material on the western end of the claims is relatively free from fines or silt. On the eastern and lower end the amount of fines in the deposit increases. The Brawner deposit was the farthest operating deposit from Las Vegas at the time but many of the other deposits had excessive fines. Statistical information from the report is that the depths of the deposit exceeds 120 feet, calculated reserves 20,000,000 cubic yards, and the cost of a semi-portable plant was estimated to be $76,000. On page 42 of the report Mr. Hill listed the future orders for November 1956 at $6,800, for December 1956 and January 1957 at $5,950 and for February, March and April 1957 at $23,000. Mr. Brawner had no water to wash the fines in the material but did have a blower to remove the silt and other fines. Mr. Hill expressed the belief that the claims were valid.

The Brawner lease was canceled as a result of a judicial decree dated August 13, 1959. The claim owners had prayed for such cancellation and a judgment of $8,000 for the nonpayment of royalties (Exh. X-5).

Before further discussing the evidence adduced, two issues should be examined. First, the requirements for a discovery are now well established. A discovery exists:

> [W]here materials have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine * * *. *Castle* v. *Womble*, 19 L.D. 455, 457 (1894); *United States* v. *Coleman*, 390 U.S. 599 (1968).

This "prudent-man" test has been refined by a requirement that showing be made that the mineral in question can be extracted, removed and marketed at a profit. *United States* v. *Coleman, supra.* This "marketability test" has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. *Palmer* v. *Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969). And since the Act of July 23, 1955, 30 U.S.C. §§ 611 *et seq.* (1970), withdrew common varieties of sand and gravel from location under the mining laws, it is necessary that the claimant for such materials show marketability as of that date. *Palmer* v. *Dredge Corp., supra; United States* v. *Clear Gravel Enterprises, Inc.*, 2 IBLA 285 (1971).

Furthermore, under well settled rules:

> * * * it must be shown * * * that there was a valid discovery on each claim at the time of the application for patent. That is, irrespective of the date on which a discovery may have been made, the claims are now invalid if, because of

> exhaustion of the deposits, or change of economic conditions, cessation of a market for the material, or some other cogent factor, the value of the materials will not justify further expenditures for the development of a mine.

United States v. *Paul M. Thomas, et al.*, 1 IBLA 209, 78 I.D. 5, 19 (1971). This principle is of equal applicability to contest proceedings initiated prior to application for mineral patent. *See Mulkern* v. *Hammitt*, 326 F.2d 896 (9th Cir. 1964). So it is clear that not only is a showing of marketability as of July 23, 1955, required, but that the contestee must also establish that in the interval from the date of the withdrawal of common varieties of sand and gravel from mineral location to the date of the contest proceedings a market for the common variety mineral has continued without any prolonged interruption. This requirement flows from the fact that if the marketability of the common variety mineral for which the claim was located is lost, the validity of the location is similarly lost and the claim may be declared null and void after contest proceedings. Mining claims are properly declared null and void for lack of present discovery of a valuable mineral deposit where there is no market or any reasonable prospect for a future market for the mineral for which the claims were located. *United States* v. *Estate of Alvis F. Denison*, 76 I.D. 223 (1969), *Mulkern* v. *Hammitt*, 326 F.2d 896 (9th Cir. 1964). Since the Act of July 23, 1955, *supra*, expressly removed common varieties of sand and gravel from location

under the mining laws, later recovery of a profitable market cannot serve to resuscitate such invalid claims.

Second, the contestee strenuously contends that the Judge erred when he held that a showing of marketability of the sand and gravel deposit *on each claim* was required to validate that claim. It cites the decision rendered in *United States* v. *Alfred N. Verrue*, 75 I.D. 300, 306 (1968):

> * * * [I]t must be shown * * * that the particular deposit itself can, and could at the critical date, be mined and marketed at a profit.

From this it argues that proof of marketability on any one claim should be sufficient to establish marketability on all claims which embrace the same deposit.

Suffice it to say that such is not the law as consistently applied by this Department. There must be evidence as to the marketability of each of the claims. *See e.g., United States* v. *Henrietta Bunkowski and Andrew Julius Bunkowski*, 5 IBLA 102, 120, 79 I.D. 43, 51-52 (1972), "The appellants must show *as to each claim* that they have found a mineral deposit which satisfies the prudent man rule . . ." (emphasis in original); *United States* v. *Frank and Juanita Melluzzo*, 76 I.D. 181, 189 (1969), "The appellants must show *as to each claim* that they have found a valuable mineral deposit and that a prudent man would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine *on that claim*."

(emphasis in original) *See also Osborne* v. *Hammitt*, Civil No. 414 U.S. D.C.D. Nev. August 19, 1964.

Contestee's argument applied to the location of common varieties of sand and gravel, would prove too much. Under its auspices a person could locate an entire desert and establish its marketability by selling sand and gravel from a single location. The fact that contestee's location followed the bed of a wash and that it has not attempted to embrace an entire alluvial fan would not limit the scope of the rule it seeks to have implemented.

Its argument that the effect of such a holding is to require competition with itself has been pressed before. *See United States* v. *Fisher Contracting Company*, A-28779 (August 21, 1962). There, as here, the contestee has misunderstood the thrust of the requirement. It is not required that the claimant produce from each claim, but that it show marketability from each claim. Production is not a prerequisite for a finding of marketability. See *United States* v. *Howard S. McKenzie*, 4 IBLA 97 (1971). The Department, however, has recognized the difficulty of proving marketability without showing any sales, pointing out in numerous cases that, while the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. *United States* v. *E. A. Barrows*

and Esther Barrows, 76 I.D. 299, 306 (1969), and cases cited.

Testimony that there was a general demand for sand and gravel in the Las Vegas area of the type present on these claims is insufficient to satisfy the present marketability test; the claimants must show the existence of an actual demand for material from specific claims as of July 23, 1955. *See United States* v. *William A. McCall, Sr., et al.*, 2 IBLA 64, 78 I.D. (1971).

The contestee argues that the Government failed to present a prima facie case as to the invalidity of the claims. What is required of the Government to sustain its burden has been stated in the past in a variety of ways. It has been said that: "[p]*rima facie* means that the case is completely adequate to support the government's contest of the claim and that no further proof is needed to nullify the claim." *United States* v. *Henrietta Bunkowski and Andrew Julius Bunkowski, supra.* This burden has been held to have been met where there is "testimony * * * by a government mineral examiner that he has examined the mining claims and the workings thereon but found no evidence of a valuable mineral deposit." *United States* v. *Harold H. Benson*, A-31061 (September 4, 1969); *United States* v. *L. B. McGuire*, 4 IBLA 307 (February 4, 1972). In the case at bar, Donald Fisher, a mining engineer employed by the Department of the Interior, testified as to his investigations of the claims, which included an examination of the land as well as interviews with various

sand and gravel operators in the Las Vegas valley and from which he concluded that there had been no discovery as of July 23, 1955, because of the excessive distance to Las Vegas market and the production of other competitors in the area. Thus, the Government established a prima facie case of invalidity under the requirements set out above.

The Government having presented a prima facie case, the burden of proof was on the contestee to establish a discovery as to each claim. To expedite the consideration of the evidence and testimony presented in the hearing, a synopsis of the testimony of witnesses which have relevance to this issue follows.

The Government witness, Fisher, testified that from the size of the pits remaining he estimated that the following quantities had been extracted: from the Charleston No. 4, 1,370 cubic yards; No. 6, 100 cubic yards; No. 7, 55 cubic yards; No. 9, 4,485 cubic yards; No. 10, 84,400 cubic yards; No. 14, 37,700 cubic yards; No. 16, 15,615 cubic yards; No. 17, 24,485 cubic yards; No. 18, 350 cubic yards; No. 21, 2,830 cubic yards. Two factors, however, must be kept in mind in dealing with these figures. First, they do not represent the amount of material removed as of July 23, 1955, but rather indicate the total amount taken through 1965, and, in some minor cases, thereafter. The second point is that Claims Nos. 1-10 lie directly in a wash and thus are subject to fill in occurring as a result of flash flooding. Therefore, it is possible that deposition has erased evidence

of greater excavations than were indicated by Fisher's calculations.

Fisher also testified that the haul from the main pits located on Claim No. 10 to the Las Vegas market was 15 miles and that in 1955 it would have resulted in excessive costs making operations on the claims unprofitable.

The Government introduced a report, written in 1961 by Edgar A. Hollingsworth, contestee's attorney, who at that time was employed by the Bureau of Land Management, Department of the Interior, which in reference to the termination of the Brawner operations declared: "According to the other operators in the area, the excessive length of the haul necessary to get finished products to market caused the company to cease its operations."

The contestee presented a number of witnesses. Rae Allen Wheeler, Jr., who had been in a trucking business in Las Vegas for 25 years, testified that he hauled approximately 300 tons of leach rock a day from Claims Nos. 4, 6, 16, 17, and 21, or a total of 3,000 to 4,000 tons a month from the middle of 1954 to 1958. This leach rock was for use in a sewage plant then under construction. The witness admitted that since that time he had not hauled any leach rock to the sewage plant.

Vernon Frehner, a contractor and trucker in the area, testified that he hauled approximately 5,000 cubic yards of road chips from 1954 to 1957 or from 1956 to 1957 from the Charleston claims and that he got "some of it" about a quarter or a half mile up

the wash from the pit on Claim No. 10, which would put the extractions either within Claims Nos. 6, 7 or 8. He also declared that he generally hauled from Claims Nos. 11 and 12.

H. Guy Jacka, superintendent of streets for the city of North Las Vegas, testified that he had purchased several thousand tons of rock chips annually from 1954 to 1958 from Brawner. He declared that he was familiar with the claims and that the material had come from Claims Nos. 13, 13A and 14.

The testimony of Harrison S. Stocks, Chairman of the Board of Directors of the Stocks Mill and Supply Company, was secured by deposition. Stocks declared that he had used material from the area of the claims for more than 30 years for his concrete aggregate and plaster sand business. The materials had been obtained from Claims Nos. 8, 10, 11, 12, 14 and 15. While the exact amount obtained was unclear, Stocks testified that fairly large quantities were removed. Stocks further testified, however, that beween 1948 and 1964 his company had very little interest in the claims. He also stated that Brawner did not have a processing plant to wash his material and as a result could not sell sufficient material.

Herman J. Young testified that after the contestee-corporation acquired the claims in 1960, he conducted an investigation on behalf of Morrison-Knudsen Construction Company to determine the feasibility of operating a plant on the claims for all types of aggregates such as base coarse, asphalt coarse, and concrete aggregate. A screening plant was constructed on

Claim No. 10 and was in operation sporadically from 1963. He planned a much more elaborate plant to crush, grade and wash the material but, owing to internal dissension within the company, he was not able to construct such a plant. Young expressed the belief that a screening plant alone was not feasible but that a complete plant to produce all potential sand and gravel products would be profitable. In addition to the operation on Claim No. 10, Morrison-Knudsen produced 37,000 cubic yards of type 1 fill material from Claim No. 14 during this period. Morrison-Knudsen paid the contestee $7,071 for 28,284 yards of this material in 1963 and 1964 (Exhibits N, O, and P). When questioned regarding the reserves of aggregate remaining on Claims Nos. 9 and 10 he estimated that there were approximately 48,000 cubic yards for each foot of depth which would amount to 4,800,000 cubic yards at a depth of 100 feet.

John C. Godfrey, Secretary of Charleston Stone Products, Inc., testified that in recent years the corporation excavated a well with ample water on Claim No. 22 at a cost of $13,000 and installed a large storage tank for use in the washing of gravel. After securing this water, the corporation negotiated a lease agreement with Arden Sand and Gravel Company and Stocks Mill and Supply Company. The lease dated July 15, 1964 (Exh. B), provides for minimum royalty of $12,000 per year and requires the contestee to construct a power line from the nearest available supply point to the well on Claim No. 22. The lease contemplated that the Arden Sand and Gravel Com-

pany would produce sand and gravel products and that the Stocks Mill and Supply Company would purchase the material for use as concrete mixed in its aggregate business.

Two other witnesses testified that they made removals of materials from various claims. Another testified that his company (Concrete Conduit) purchased approximately 22,000 cubic yards in two years commencing sometime after 1965, the material coming from Claim No. 10.

Contestee contends that the sand and gravel deposits located on each of the claims is an uncommon variety with the result that it is not required to prove marketability as of July 23, 1955, but only as to the time of the institution of contest proceedings. The relevant statute provides, *inter alia*, that:

> No deposits of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mineral claims hereafter located under such mining laws. * * * "Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it *distinct and special value.* * * * (Emphasis added.) 30 U.S.C. § 611.

The regulations regarding common varieties are found in 43 CFR 3711.1(b):

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. * * *

The Department has interpreted the Act and regulations so as to require an uncommon variety of sand, stone, etc., to meet two criteria: "(1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use." *United States* v. *U. S. Minerals Development Corporation*, 75 I.D. 127, 134 (1968).

The criterion for determining whether a deposit of sand and gravel claim contains an uncommon variety is whether the material from the deposit commands a higher price in the market place or has uses for which ordinary varieties would be unsuited. *United States* v. *U. S. Minerals Development Corporation, supra.* The Judge in the case at bar held that "the sand and gravel on this group of claims are high quality materials but used only for the same purposes as many

other deposits of sand and gravel in the Las Vegas Valley. There was no evidence that the materials have a special and distinct value for these uses." Accordingly, he held that the deposit must be considered a common variety as defined in the Act of July 23, 1955, *supra*.

The contestee takes vigorous exception to this finding and argues that for a variety of reasons the deposit is unique.[2] A close reading of the Judge's decision, however, reveals that he did not controvert this contention but rather found that there was no evidence, even assuming the presence of unique properties, that these properties imparted a distinct value to the deposit.

On this point, rather than attacking the Judge's findings of fact, the contestee argues that the position of the Department is unsustainable by any fair reading of the statute. It argues that the Department is limited to a consideration of the intrinsic properties of the mineral and that by relating its special value to its proposed use, the Department has violated the intent of the Congress in enacting section 3, Act of July 23, 1955, *supra*.

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[2] Among the qualities which he contends might give the deposit unique value are: high specific gravity; marked resistance to abrasion; insignificant reactivity; and absence of caliche. In light of the disposition of this issue, *infra*, it is not necessary to decide whether the conjunction of the characteristics set out are sufficient to give the deposit a unique value.

The difficulty with the contestee's position is that the statute requires that the deposit, to be uncommon, must have "some property giving it distinct and special *value*." Valuation, by its nature, requires advertence to exogenous factors. Gold has value in relation to the scarcity of its occurrence. By the same token, to speak of the value of so ubiquitous a commodity as sand or gravel without reference to its use is to shovel smoke. In dealing with such commonly occurring minerals consideration of prospective use is an integral adjunct to any attempt to ascertain value, and particularly to determine "special value" as required by the clear statutory language. The consideration of prospective use is not extrinsic in the sense of the location of the deposit; rather it is part and parcel of the evaluation of the deposit mandated by Congressional intent. As such, Departmental practice is clearly in accord with the statutory provisions.

As there has been no evidence introduced that the sand and gravel occurring in the deposit can call forth a higher price for any of its destined uses, even assuming *arguendo* that it is of superior quality, the Judge was correct in holding that the minerals were a common variety. And, a fortiori since the Charleston Claims Nos. 12A and 13A were not located until after July 23, 1955, they cannot be the subject of a valid discovery.

On the issue of marketability the Judge found that:

> "Mr. Brawner was operating from Claim 10 and was utilizing material from Claim 9 at the rate of approximately 5000 yards a year * * * As to the latter part of 1955 or in 1956 the Brawner operation would have been sufficient to validate Claim 10 and, as the source of the reserve material, Claim 9.

The government raises a number of contentions regarding this finding. First, it argues that the removals, at the rate of 5,000 cubic yards annually, represent such a small amount of income that they should be considered *de minimim. See, e.g., The Atchison, Topeka & Santa Fe Railway Co.* v. *Emma Mae Cox*, 4 IBLA 279 (January 31, 1972). It is noted in the record, however, that Mr. Brawner, as a lessee had agreed to pay a minimum royalty of $200 a month for the right to operate from the claims. Thus, to the lessors, the annual income from the claims would be the $2,400 per year rental. It is, of course, true that the rental was based on the right to mine all of the claims. But in point of fact, the Brawner operation at the critical date was primarily limited to Claim No. 10, and the valuation he put on its worth by limiting his activities to its area, while obligating himself to the full annual rental, is certainly probative of the claim's real marketability.

The government further contends that even granting the marketability of the material on Claim No. 10 as of July 23, 1955, this marketability was lost

between that date and the initiation of the contest proceedings. On this point the Judge found that:

> * * * there has been a market for the material from Claims 9 and 10 since 1955. What was lacking was not a market, but an operator-lessee with the proper equipment to produce the material.

The government contends that there was no production from 1957 to 1965. The government's witness Fisher testified, however, that during 1959 and 1960 Frank R. Sullivan, who in 1959 had acquired the claims from the original locators, was reported "* * * to have produced and stockpiled considerable amounts of sand and gravel on the claims. * * *" Fisher subsequently related a conversation with Sullivan in which the latter declared that the material removed "* * * was used when he had the claims for roofing granules at Nellis Air Force Base." Further, the lack of production from 1960 to 1963 was adequately explained by Young as the result of internal friction within Morrison-Knudsen, and certainly the contract negotiations between Charleston Stone Products, Inc. and Stocks Mill and Supply Co. and Arden Sand and Gravel, culminating in a beneficial agreement, have not worked a termination of the market for the material from Claim No. 10. Thus, there was no loss of market as regards Claim No. 10, and accordingly, we find that the Judge correctly validated Claim No. 10.

The government also argues that the Judge erroneously validated Claim No. 9 as a source of reserve material. Two points are salient on this issue. The Judge had already found that 5,000 cubic yards of material were mined annually from Claim No. 10, with some overlap into Claim No. 9. It is stated in the record that the estimated reserves on Claims Nos. 9 and 10 are in excess of 1,000,000 cubic yards of useable material. At the rate of removal occurring in 1955, the Judge's decision provides as a reserve a 200-year supply. This is far in excess of the reserve normally granted, *see United States* v. *Robert E. Anderson, Jr.*, 74 I.D. 292 (1967). Even utilizing the Judge's stated rationale it is difficult to see how Claim No. 9 could be validated as a source of reserves.

A more basic problem is, as was pointed out by the Government, the Judge's misunderstanding of 43 CFR 3711.1(b), as it relates to reasonable reserves. A claim is not validated *as* a reasonable reserve; rather, the presence or absence of a reasonable reserve *within* the claim is looked to in determining the present marketability thereof. *See United States* v. *William A. McCall and R. V. Kaltenborn*, 1 IBLA 115, 122 (1970). There must be independent evidence of the present marketability of a claim held as a reserve in order to validate that claim. *United States* v. *Neil Stewart*, 5 IBLA 39, 55 (1972). Thus, Claim No. 9 must rest upon its own factual situation and the Judge's validation of it "as a source of reserve material" must be set aside. If it is to be validated, it must have independent marketability. For reasons elaborated, *infra*, we believe that it does not and therefore to this extent the Judge's decision must be reversed.

The Judge also found that the contestee had not established marketability as of July 23, 1955, for any of the remaining Charleston placer claims.

Contestee admits that there was no evidence of actual sales as regards the Charleston, and Charleston Nos. 1, 2, 3, 5, 18, 19, 20, and 22.

The contestee argues that leach rock was quarried on Claim No. 8, but no testimony was adduced on this contention. Contrary to contestee's interpretation both contestant's Exhibit 6 and contestee's Exhibit X-4 support the government witness Fisher's statement that the quarrying occurred at the southwest corner of Claim No. 10 and outside of the northeast corner of Claim No. 8. It is, of course, obvious that the "face" of the deposit continues into Claim No. 8, but there is, in the record, no evidence of any mining of leach rock from Claim No. 8. As regards the testimony of Mr. Wheeler, it is to be noted that it was stipulated by counsel for both parties that leach rock has a useful life of approximately 15 years. The demand for leach rock is limited to that amount needed to supply nearby sewage and water filtration plants, a market which is both limited and of infrequent recurrence. *Cf. United States* v. *Clark County Gravel, Rock and Concrete Company*, A-31025 (March 27, 1970) as regards the supply of volcanic or leach rock in the Las Vegas area. We have noted,

supra, that the marketability requirement as it relates to minerals withdrawn from location is a continuing one, and while it may be difficult to draw a precise line delineating at what point the loss of a market has negated a prior discovery, it is obvious from the facts of the instant case that such a loss occurred here. Since relocation of the claim is impossible, the proposed expansion of the filtration system in the area which coincided with the contest proceedings would be insufficient to revive a claim predicated on the presence of leach rock thereon. Therefore, these removals may not properly be considered in the determination of the marketability of the deposits in Claims Nos. 4, 6, 16, 17 and 21.

The removals by Vernon Frehner occurred in 1956. Accordingly, they may not properly be considered as to the issue of marketability at the critical date of July 23, 1955.

Stocks testified that his purchases of materials terminated in 1948. Contestee argues that because of his advanced age, Stocks was mistaken as to the dates involved. It seems to us somewhat anomalous to argue that Stocks could err up to seven years as regards the time element and then go on to contend that his testimony is sufficiently accurate in reference to the location of the mining activities so as to validate Claims Nos. 8, 11, 12, 14 and 15. Be that as it may, Stocks repeatedly testified that he had no access to the claims after 1948 and his testimony as to the withdrawals can only be given weight in relation to the dates he has insisted on.

Jacka's testimony referred to Claims Nos. 13, 13A and 14. Claim No. 13A, of course, has already been deemed void ab initio since it was not located until after the passage of the Act of July 23, 1955. Jacka, however, at one point declared that he bought no material until 1956 and another time declared that Brawner was the low bidder for supplying chips to the city of North Las Vegas from 1954 to 1958. This apparent contradiction in testimony can only be reconciled by assuming that though Brawner was the low bidder, no actual purchases were made until 1956. This is in accord with Jacka's statement concerning a flood in either 1954 or 1955, the aftermath of which prevented resurfacing work from going forward. Accordingly, no actual sales have been proved from the claims at the critical date. The other testimony as regards extractions was too general to be efficacious in determining the locus of actual sales occurring prior to the critical date.

Actual sales, however, are only one indicium of marketability. Other relevant criteria are bona fides of development and distance to the market. As of 1955 the distance to the market from the main pits, approximately 15 miles, appears excessive. Certainly the distance cannot be said to weigh positively on the side of marketability. Furthermore, bona fides in development occurred only in Claim No. 10.[3] Bona fides,

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[3] It is to be noted that much of the evidence adduced at the hearing related to present developmental intentions. However relevant such plans may be to the issue of marketability at the time of the contest proceedings, they cannot be said to

like marketability, must be related to specific claims, and contestee cannot successfully apply the bona fides shown as regards No. 10 to validate the other claims.[4]

Considering the market demand and the supply available for that market as of July 23, 1955, we find that the contestee has not met the burden of proving marketability as to the claims other than Claim No. 10.

We have also considered the evidence in light of the recent decision of the Ninth Circuit Court of Appeals in *United States* v. *Verrue*, 457 F.2d 1202 (1972). We note that its rationale is inapplicable to the case at bar. In *Verrue* the Court validated the contested claim because there was no controversion of appellee's evidence that the "material on Sandy No. 2 was marketable at a profit" during the relevant period. *Id.* at 1204. Thus, the opinion in that case was directed to a contest of a single claim.

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bear on the issue of marketability as of July 23, 1955. Since we have decided that there was no showing of marketability as of the date of withdrawal of sand and gravel from mineral location, it is unnecessary to examine the question of whether, and to what extent, marketability was shown as of the date of the initiation of the proceedings.

[4] Contestee protests that this decision would leave him without a water supply. While this may well be the case, it is nevertheless impossible to validate a claim simply because the contestee needs it for the more economic workings of a valid claim. Claim No. 22, on which the well is located, must stand or fall on the merits of *its* discovery. Having determined that there was no valid discovery thereon, *supra*, the mere fact that there is now a producing water well on the claim will not nullify the absence of a valid discovery.

This case, on the other hand, involves twenty-five different claims. The only clear statement as to marketability at the critical date is found in the deposition of Starr Hill, Jr. He declared that he considered all the Charleston claims to be valid.

This simple statement, however, cannot be used to validate all twenty-five claims. All that it can fairly be said to indicate was that there was an existing market, at the critical date, for sand and gravel from some of the claims embracing the deposit. To the extent that this declaration has reference to Claim No. 10 we agree. But it cannot be said that Hill had advertence to each of the twenty-five claims when he made his statement; the very next question asked was whether he agreed "* * * that the deposit encompassed by the claims was a valid mineral deposit under the mining laws?" To which Hill answered, "Yes."

It seems clear that Hill was utilizing the theory, advanced by the contestee, that the establishing of the validity of one claim on a single deposit has the effect of validating all claims on that deposit. We have rejected this position for the reasons stated, *supra*.

Another crucial difference between the case at bar and that in *Verrue* is that the latter case does not encompass the issue of loss of market after a valid location, but is merely limited to the question of the marketability of the claim at the critical date. In the instant case sales, developmental work, etc., on all of the claims, with the exception of Claim No. 10, occurred infrequently and intermittently. Thus,

even if a finding of marketability as of July 23, 1955, were mandated by the *Verrue* decision, subsequent events provide ample proof that the marketability had been lost and could not be regained, for the reasons discussed, *supra*. Therefore, the *Verrue* case does not, by any realistic reading, require the validation of all of these claims.

Appellant has requested oral argument. The issues in this case, however, have been extensively briefed by both parties before the Judge and again before this Board. Oral argument would therefore serve no useful purpose and it is hereby denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed as to its holding that the Charleston No. 9 placer mining claim is valid, and is affirmed as to its holding that the Charleston No. 10 placer mining claim is valid, and the Charleston, and the Charleston Nos. 1-8, 11-22, 12A and 13A placer mining claims are invalid.

/s/ Douglas E. Henriques
DOUGLAS E. HENRIQUES, Member

We concur:

/s/ Joseph W. Goss
JOSEPH W. GOSS, Member

/s/ Martin Ritvo
MARTIN RITVO, Member

APPENDIX E

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals
Interior Board of Land Appeals

4015 Wilson Boulevard
Arlington, Virginia 22203

ROBERT L. BEERY, *et al.*

IBLA 76-354 Decided June 28, 1976

Appeal from decision of California State Office, Bureau of Land Management, rejecting patent application CA 3206 and declaring two mining claims null and void.

Affirmed.

1. Mining Claims: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Minerals Involved: Water
   Water is not a mineral which is locatable under the general mining law.
2. Mining Claims: Generally
   The bottling and distribution for sale of spring water for human consumption does not constitute the making of a valuable mineral deposit under the general mining law.
3. Mining Claims: Withdrawn Lands—Withdrawals and Reservations: Effect of
   Mining claims located on land withdrawn from

all forms of entry are null and void from the beginning.

4. Withdrawals and Reservations: Springs and Waterholes
Even though springs and waterholes withdrawn from mineral entry by Executive Order 107 may not be in use, they nevertheless remain withdrawn so long as they provide sufficient water for public watering purposes.

APPEARANCES: Robert L. Beery, Esq., San Francisco, California, for appellants.

OPINION BY
ADMINISTRATIVE JUDGE STUEBING

Robert L. Beery and others appeal from the November 10, 1975, decision of the California State Office, Bureau of Land Management (BLM), rejecting their patent application (CA 3206) for two placer mining claims and declaring both claims to be null and void. The mining claims known as the Chemise Springs and South Chemise Springs placer mining claims, are situated in sections 30 and 31, T. 5 S., R. 2 E., Humboldt Meridian, California. The California State Office rejected both claims for two reasons. First, the claims were located on land which was withdrawn from mineral entry. Second, the purported discovery is of "natural mineral spring water," a substance held to be not locatable by an earlier decision of this Department.

Appellants assert that the land was not actually withdrawn from mineral entry. Moreover, they ar-

gue, since mineral spring water is widely considered to me a mineral, it should be locatable under the general mining law, 30 U.S.C. § 21 *et seq.* (1970). Its value, they assert, lies in the fact that the spring water may be bottled and sold at a profit for human consumption.

[1] This Department long ago held that mineral spring water is not locatable under the general mining law. *Pagosa Springs*, 1 L.D. 562 (1882). In that case, Secretary Teller stated:

> Many springs and many waters are impregnated with minerals held in solution; but it does not follow that the lands bearing such waters are mineral lands, and can be patented as such. Lands of a saline character are an exception, and are expressly provided for in the laws relating to the disposition of the public lands. Lands containing mineral springs not of a saline character are subject to sale under the general laws, and not under the acts relating to the sale of mineral lands. * * * [Citation omitted.]

In a second case arising only a year later, Secretary Teller stated:

> Where it is evident that an application for a placer claim is in fact an attempt to secure a patent for a water right the application will be rejected.

William A. Chessman, 2 L.D. 774 (1883). While this case deals with water generally, instead of mineral spring water, specifically, the principle is still the same: water is not a mineral which is locatable un-

der the general mining law, and an application for patent to a placer mining claim which is perceived to be an attempt to acquire a water right must be rejected.

Another case involving mineral water is *United States* v. *Springer*, 8 IBLA 123 (1972), *aff'd*, 491 F.2d 239 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1975). In that case there were mineral springs on 6 of the 10 mining claims involved. Some of the water was evaporated, leaving mineral salts which were then packaged and "hawked" through Dr. Springer's religious radio programs. Some of the water was also used for bathing purposes. Dr. Springer believed that the mineral salts and mineral water had medical benefits. While the locatability of the mineral water was not directly in issue in that case, it is clear that the Court of Appeals for the Ninth Circuit did not consider these activities to be mining within the meaning of the law. The opinion by the Court of Appeals noted that some of the mineral spring water was bottled and distributed gratis, and other water from the claimed springs was used for therapeutic baths. Although the water was not sold for a price, contributions were solicited.

In *United States* v. *Union Oil Co. of Calif.*, 369 F. Supp. 1289 (D. N.D. Calif. 1976), the Court held that a reservation of "coal and other minerals" to the United States on lands patented under the Stock-raising Homestead Act did not include a reservation of geothermal steam and other geothermal resources, since they are not "minerals" within the meaning of

the Act. The Court noted that the strong weight of authority is that water was not considered to be a mineral when the legislation was enacted in 1916. At 1297.[1]

The most recent reference by this Board to the locatability of mineral water appears in *United States* v. *Bienick*, 14 IBLA 290, 297 (1974), where, in a special concurrence, it was noted that among materials held to be not locatable was mineral spring water, citing *Pagosa Springs*, *supra*.[2]

If we are to pay more than lip service to the doctrine of stare decisis we must adhere to those cases, unless there is some compelling reason to the contrary. Appellants argue that because mineral spring water is widely considered to be a mineral, it should be locatable pursuant to section 1 of the Act of May 10, 1872, *as amended*, 30 U.S.C. § 22 (1970). That act provides that *all* valuable mineral deposits in public domain lands are open to exploration and purchase. Appellants' argument is not persuasive for

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[1] Appeal pending. However, even were the ruling in *Union Oil* reversed, it would not alter our conclusion in this case, as all minerals which may be included in a patent reservation are not necessarily locatable under the mining law. *See* discussion of non-locatable minerals, *infra*.

[2] The decisions in *United States* v. *Gray*, A-28710 (May 18, 1962); A-28710 (Supp., May 7, 1964); A-28710 (Supp. II, April 6, 1965), do not concern the locatability of mineral spring water. What was at stake were deposits of mineral salts which were used to make mineral water. The issue was not whether the "manufactured" mineral water was locatable, but whether the mineral salts used in the manufacture were locatable. The claims were held invalid in that case.

several reasons. First, whether water is considered a mineral generally depends on the context. Second, not all minerals are locatable under the general mining law. Third, even salt springs were never disposable under the Act of May 10, 1872. *See* Opinion, 49 L.D. 502 (1923). Fourth, Congress could not have intended for water to be locatable under the mining law.

In support of their argument that water is mineral, appellants have cited a number of cases. The lead case is *United States* v. *Shurbet*, 347 F.2d 103 (5th Cir. 1965). In that case, the Court of Appeals for the Fifth Circuit did say in dictum that water in the North Texas area is a mineral. *Ibid.* at 107. However, the issue in that case is whether water is a "natural deposit" within the meaning of section 611 of the 1954 Internal Revenue Code, 26 U.S.C. § 611 (1970). That section deals with cost depletion for mining. The court held that water in the "high plains" area of North Texas is such a deposit. That finding in no way turned on water being classified as a mineral. The only California case cited is *Cornwell* v. *Buck & Stoddard*, 28 Cal. App. 2d 333, 82 P.2d 516, 518 (2d Dist. Ct. App. Cal. 1938), where the court stated:

> Minerals are usually solids. The only ones which are liquids at ordinary temperatures being water and mercury.

As with the previous case, the statement was pure dictum. The issue was whether oil and gas drilling equipment, for tax purposes, should be considered

mining equipment. Notwithstanding the dicta in some cases, there are cases construing deeds finding water to be a mineral; there are also many to the opposite effect. *See, e.g., Stephens Hays Estate Inc.* v. *Togliatti*, 85 Utah 137, 38 P.2d 1066 (1934), where a solution of copper and water was found not to be a mineral in a deed conveying all minerals in or on the land; *Vogel* v. *Cobb*, 193 Okla. 64, 141 P.2d 276 (1943), where "other minerals" in a deed did not include water even though in a technical sense it may be thought of as a mineral; *Sun Oil Co.* v. *Whitaker*, 412 S.W.2d 680, 684 (Tex. Civ. App. 1967), *aff'd* 424 S.W.2d 216 (Tex. 1968).

Even if water were held to be a mineral it does not necessarily follow that it is locatable under the general mining law. In *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U.S. 526, 530 (1903), the Supreme Court stated:

> The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it.

As was pointed out in the spcial concurrence in *United States* v. *Bienick*, *supra*, many minerals are not considered locatable, even though a profit might be made from their sale. Among these minerals are

dirt, common clay, "fill" material, brick clay, peat, certain limestone and "blow sand." In discussing the reasons why these materials are not locatable, we apply Justice Holmes' statement that, "A page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

What is loosely referred to as the "general mining law" includes several different laws enacted within a decade of the Civil War. At the same time, this was also the period when the American West was being won by those ubiquitous heroes of contemporary legend and entertainment—cowboys, soldiers, and particularly, miners and homesteaders. At that time land was classified by the General Land Office as being either mineral land or agricultural land. Mineral land could be entered only under the mining laws; agricultural land could be entered only under the agricultural land laws, such as the homestead and desert land entry acts. Also during this period the Congress was awarding grants of non-mineral land to the states and to the railroads. If all those substances which are quite literally "minerals," such as common dirt, were locatable under the mining law, there could have been no entry under the homestead or other agricultural entry laws, nor any land grants to states and railroads, as all land would then have been "mineral land." This was the Department's point in *Holman* v. *State of Utah*, 41 L.D. 314, 315 (1912):

> It is not the understanding of the Department that Congress has intended that lands shall be

> withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. It is safe to say that every kind of material found in land in its natural state may under some circumstances be put to non-agricultural uses. Local demand for building of levees or railroad embankments, filling up low places and the like, may make any particular land more valuable for the time on account of the material it contains than on account of its agricultural possibilities, but it is clear that such considerations can not be given weight in determining what lands are reserved for special disposition because mineral in character. In one sense, all land except portions of the top soil is mineral. The term, however, in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance.

Moreover, even though the need to have land available for homesteads may have diminished, there is a

more compelling reason for continuing to hold that certain minerals are not locatable. To hold otherwise is to invite widespread abuse of the mining law. Sand and gravel provide an excellent example on this point. Prior to 1929 sand and gravel were not considered locatable under the general mining law. Several ostensible reasons were given for that holding in *Zimmerman* v. *Brunson*, 39 L.D. 310 (1910). Though not stated until 1933, the Department's real objection was the ease with which one could obtain a patent to public land for uses other than mining merely by asserting that the land was valuable for sand, gravel, or other minerals of widespread occurrence. *Solicitor's Opinion*, 54 I.D. 294, 296 (1933). Nevertheless, the Department ignored these fears which turned out be all too prescient. Between 1929, when sand and gravel was first held to be locatable, and 1955, the abuse of the mining law by sand and gravel claimants seeking title to public land for purposes other than mining became so offensive that the Congress, with the support of the mining industry, finally removed sand, gravel, and certain other common minerals of widespread occurrence from locatability under the mining law. Act of July 23, 1955, 30 U.S.C. §§ 611-615 (1970). Because of the widespread occurrence of water, the Department would be inviting a repeat of the abuses attending the locatability of sand and gravel, if it were to hold water locatable.

Even if these difficulties could be surmounted, it is nevertheless clear that Congress could not have in-

tended that water be locatable. Through the enactment of three different provisions coetaneous with the enactment of the mining law, it is apparent that Congress intended that water should be severed from the public domain and acquired in accordance with the laws of the various western states. The first of the three provisions is section 9 of the Act of July 26, 1866, 30 U.S.C. § 51 (1970), part of the general mining law. Essentially, this provision recognized rights which had accrued under the appropriation system and provided for rights of way for ditches and canals. The recognition of rights under the appropriation system was approval of the severing of water from the public domain. The second provision dealing with water is section 17 of the Act of July 9, 1870, *as amended*, 30 U.S.C. § 52 (1970), also part of the general mining law. That act provides that all patents to public lands would henceforth be subject to the provisions of section 9 of the Act of July 26, 1866, 30 U.S.C. § 51 (1970). The third provision is section 1 of the Act of March 3, 1877, *as amended*, 43 U.S.C. § 321 (1970), part of the desert land entry laws. The Supreme Court discussed at length the effect of the three provisions in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 154-56 (1935). It concluded with respect to the last provision:

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell* v. *Johnson*, 89 Fed. 556, 558.

> The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that *all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.* The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation.* It is hard to see how a more definite intention to sever the land and water could be evinced. [Emphasis added.]

295 U.S. at 162.

There is only one conclusion that can be drawn from the preceding statement. Because the usufructuary right to water was to be disposed of in accordance with *state* law, it could not at the same time be disposed of under the general mining law. Moreover, because two of the three statutory provisions severing the water from the land were enacted as *part* of the general mining law, it seems fairly clear that Congress had no intention of disposing of water under other provisions of the mining law.

Therefore, we adhere to previous decisions of this Department holding that water or mineral water is not a mineral which is locatable under the general mining law. *Pagosa Springs, supra; William A. Chessman, supra; United States* v. *Bienick, supra.*

[3] As previously noted, appellants also challenge the finding by the BLM that the land in question was and is withdrawn from entry under the mining law. The California State Office held in its decision:

> By Executive Order No. 5237 of December 10, 1929 all of the unreserved public lands in T. 5 S., R. 2 E., H.M. were temporarily withdrawn for classification. Subsequently, the King Range National Conservation Area was established by Secretarial Order of September 21, 1974 under the Act of October 1, 1970 (84 Stat. 1067; 16 U.S.C. 460y) and Executive Order No. 5237 was revoked in accordance with Sec. 8 of the Act.
>
> Therefore, at the time of the purported locations and amendments thereto of the Chemise Springs placer mining claim on September 27, 1970 and June 25, 1972; and the South Chemise Springs placer mining claim on September 26, 1970 and June 25, 1972 the land was effectively withdrawn from location by Public Water Reserve No. 107 and Executive Order No. 5237 and the claims are hereby declared null and void ab initio.

It is important to note at this point that both claims were located in 1970; amended location notices for each claim were filed in 1972 and 1975. It is clear that E.O. 5237 was revoked by section 8 of the Act of October 21, 1970, 16 U.S.C. § 460y-7 (Supp. IV 1974), as of the date of Secretarial Order establishing the King Range National Resource Area, September 21, 1974. Any claim located prior to that time was null and void from the beginning, as mining claims

may not be located on land closed to mineral entry. *John Boyd Parsons*, 22 IBLA 328 (1975); *Russ Journigan*, 16 IBLA 79 (1974); *Albert Gardini*, A-30958 (October 16, 1968); *Leo J. Kottas*, 73 I.D. 123 (1966); *aff'd sub nom. Lutzenheiser* v. *Udall*, 432 F. 2d 328 (9th Cir. 1970). Therefore, only the 1975 location notices remain in issue, as the previous notices were of no effect.

[4] Appellants contend that Executive Order 107 of April 17, 1926, 43 CFR 2311.0-3, 43 U.S.C. § 300 (1970), does not bar mining in this area. They contend that the order never applied to these lands because it was never noted on land office records. That argument is not persuasive as the withdrawal has been a matter of public record since its promulgation. *See, e.g., Instructions*, 51 L.D. 457 (1926); 43 CFR 292.1, 2, 3 (1938); 43 CFR 2321.1-1 (1969); 43 CFR 2311.0-3 (1976).[3] *See also* the discussion of this point in *John V. Hyrup*, 15 IBLA 412, 415-16 (1974).[4]

Appellants argue in the alternative that the land is unlikely to be used for watering because the springs are either too small or too inaccessible to be used for watering purposes.[5] Appellants speak of a "modest"

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[3] Actually, the withdrawal does not appear in land office records under the "Index to Miscellaneous Documents, Documents Applying to Lands Not Specifically Described on Which Conditions Restricting Disposal or Use May Exist."

[4] Reversed on other grounds *sub nom. Hyrup* v. *Kleppe*, 406 F. Supp. 214 (1976), appeal pending.

[5] Although appellants assert that the waters from the subject springs are healthful, it is not clear whether the waters have any restorative powers. In the Statement of Reasons at

quantity of water and state that the flow is "totally insufficient" for the stated purpose of the withdrawal —stock watering. According to appellants' patent application, they plan to bottle 840 gallons of water per day. That amount is certainly sufficient for public watering purposes. The principal criterion for withdrawal is *whether* there is sufficient water for possible use. *See Frank Rauzi*, A-28602 (August 15, 1962).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Edward W. Stuebing
EDWARD W. STUEBING
Administrative Judge

We concur:

/s/ Joseph W. Goss
JOSEPH W. GOSS
Administrative Judge

/s/ Martin Ritvo
MARTIN RITVO
Administrative Judge

6, appellants describe the springs as "substantially mineralized." However, in that context it is noteworthy that "every smallest legal subdivision of the public land which * * * contains a hot spring, or a spring the waters of which possess curative properties; and all the land within one-quarter mile of such spring located on unsurveyed land be * * * withdrawn from settlement, location, sale, or entry, and reserved for lease * * *." 43 CFR 2311.0-3(b).

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Supreme Court, U. S.
FILED
FEB 6 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-380

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR, PETITIONER
v.
CHARLESTONE STONE PRODUCTS CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1977
CERTIORARI GRANTED NOVEMBER 28, 1977

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RELEVANT DOCKET ENTRIES

United States District Court for the District of Nevada

Civil Docket No. LV–2039–BRT

CHARLESTONE STONE PRODUCTS CO., INC., PLAINTIFF-APPELLEE

vs.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, UNITED STATES OF AMERICA, DEFENDANT-APPELLANTS

5– 4–73	Filed complaint for review with attachment J5–5.
7– 2–73	Filing answer with affidavit of mailing.
7–12–73	Filing request to file transcript of Testimony and Exhibits, the Entire [Administrative] Record with affidavit of mailing attached.
10–15–73	Filing Defendant's Motion for Summary Judgment, with certificate of service by mail.
12– 6–73	Filing Counter Motion for Summary Judgment, with service acknowledged thereon.
12–19–73	Lodging Administrative File in Two Vol. (In Exhibit Room)
12–23–73	Lodging Administrative File in One Vol. (In Exhibit Room)
6–14–75	Filing Minutes of Court. Hearing on Motions for Summary Judgment. The Court hears arguments and takes matters under submission.
11– 8–74	Filing the memorandum opinion.
11– 8–74	Filing Judgment, VIZ: IT IS HEREBY ORDERED: The decision of the Interior Board of Land Appeals filed January 18, 1973 is vacated and set aside and the subject matter of this action is remanded to the Department of the Interior for further proceedings consistent with the opinion filed. Copies to counsel entered on 11–8–74.

RELEVANT DOCKET ENTRIES

United States Court of Appeals for the Ninth Circuit

75-1532

CHARLESTONE STONE PRODUCTS CO., INC., PLAINTIFF-APPELLEE

vs.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, UNITED STATES OF AMERICA, DEFENDANT-APPELLANTS

	1975	
Mar.	6	Docketed cause and entered appearances of counsel.
Mar.	7	Filed cert. transc. record on appeal in one volume; Vol. I pleadings, one cert. copy; * * * one box of exhibits filed in room 219 * * *
	1976	
Mar.	9	Argued and submitted to Trask, Goodwin CJJ, and East, DJ.
	1977	
May	12	Ordered opinion (William G. East, DJ) filed and judgmt. to be filed and entd.
May	12	Filed opinion—Affirmed and remanded.
May	12	Filed and entered judgment.
July	20	Filed Aple's motion for mandate to issue.
July	22	Rec'd Aplt's Motion for Stay of Mandate (late) and Opposition to Aple's motion to issue mandate.
Aug.	25	Recvd as of Aug. 4, Letter to Sol. General from Clerk of Supreme Court advising him that Mr. Justice Rehnquist granted extension to file certiorari until Sept. 9, 1977.

1977	
Aug. 27	Filed, as of 8/25/77, order (T,G, & East) it is ordered that this mandate upon the decision in the above-captioned case be stayed until 9/10/77, or if a petition for certiorari is filed in the USSC on or before that date, until denied by the USSC, or if granted, until the matter is finally resolved by that court.
Sept. 15	Received Supreme Court certificate of filing petition for certiorari on Sep. 9, 1977, assigned No. 77-380 (to panel).
Dec. 1	Filed cert. copy of SC order *granting* certiorari on 11/28/77. Copy of order to panel.

REPORT ON SAND AND GRAVEL MARKETABILITY IN LAS VEGAS VALLEY, NEVADA

November, 1956
Starr Hill, Jr.
Earl M. P. Lovejoy

H. INVESTIGATION OF OPERATING SAND AND GRAVEL PITS AND PLANTS IN LAS VEGAS AREA E. J. BRAWNER SAND & GRAVEL CO.

A. Deposit

[Picture omitted.]

1. Location: North 7 miles on Tonopah highway, then 4 miles west, a total of 11 miles from Las Vegas.
2. Size of deposit: 600 acres held by 30 lode claims.
3. How long claims have been owned: Claims located in 1942.
4. Type of sand and gravel *in pit:*
   (a) Depth: Exceeds 120 feet.
   (b) Bedrock: No caliche or bedrock reached.
   (c) Excavation: Easily excavated—no cementation.
   (d) Type of Rock: Limestone—angular.
   (e) Rock size: Very few oversize (½%).
   (f) Sand: Passes sulphate and rattler test.
5. Calculated gravel reserves: 20,000,000 cu. yds.

B. Plant

1. Description of plant:

[Picture omitted.]

   (a) Location: Plant is at the pit.
   (b) Stationary or portable: Semiportable.
   (c) Cost of plant: $76,000.00.
   (d) Make of plant: Dodge and Tyrock.
2. Type of material produced:
   (a) Suitable material for the manufacture of concrete pipe. (1) Supply Concrete Conduit Co.

(b) Concrete aggregate: (1) Supply Stocks Transit Mix.

(c) Plaster and masonry sand.

(d) Plans to use lower claims for new Tonopah highway.

(e) Plans to crush limestone ledges to 3" to furnish material for runway construction at Nellis A.F.B.

3. Capacity of plant: 1,200 tons/8 hrs.

4. Past production: Brawner has produced 15,000 cu. yd. Pit has produced 75,000 cu. yd.

5. Production costs:

$0.06/ton mile to haul.

$0.25/ton to load.

Current retail prices—(Delivered to center of Las Vegas):

Plaster sand—$3.50–$4.50/cu.yd. (depends on size)

Concrete sand—$3.25/cu.yd.

1½"–⅜"—$3.25/cu.yd.

Pea gravel—$3.00/cu.yd. (¼"–⅜")

6. Source of water: No water at the pit or plant.

• • • • •

8. Present production:

During September and October business was very quiet.

Future outlook is good: (1) Contracts for $6,800.00 in November; (2) contracts for $5,950.00 in December and January; (3) contracts for $23,000.00 in February, March and April.

9. Maximum capacity of plant: 3,600 tons of aggregate/24 hours.

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U.S. Department of the Interior, Bureau of Land Management

Nevada 065729 (A–Q) and NEVADA 065731 (A–B) (Involving CHARLESTON Nos. 1 to 22 and CHARLESTON 12A and 13A placer mining claims, situated in Secs. 34, 35, 36, T. 19 S., and in Secs. 3 and 4, T. 20 S., R 59 E., MD Meridian, Clark County, Nevada.)

UNITED STATES OF AMERICA, CONTESTANT

v.

CHARLESTON STONE PRODUCTS, INC., CONTESTEE

Deposition of HARRISON S. STOCKS, Las Vegas, Nevada, July 19, 1966, 1:30 o'clock p.m.

Before: Hon. PAUL J. DUMM, Hearing Examiner, U.S. Department of the Interior, Bureau of Land Management

Appearances:

For the Contestant: Otto Aho, Field Solicitor, U.S. Department of the Interior, Reno, Nevada.

For the Contestee: E. A. Hollingsworth and Lee Walker,

Attorneys at Law.

MARK M. GRUMLEY,
Official Reporter.

[8] HARRISON S. STOCKS, called as a witness on behalf of the Contestee, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. HOLLINGSWORTH:

Q. Will you please state your full name.
A. Harrison S. Stocks, Harrison Sidney Stocks.

883-437 O - 70 - 5

Q. Where do you live, Mr. Stocks?
A. Las Vegas.
Q. That is in Nevada?
A. Las Vegas, Nevada, yes.
Q. What is your present occupation?
A. Ready mix business.
Q. Ready mix business?
A. Ready mix concrete.
Q. How long have you been in the ready mix business?
A. Well, in the actual ready mix business, about 12 years, but we were in the concrete ready mix business in the old fashioned way ever since 1928, '29, you know, mixing by small mixers, and so forth, but in the actual ready mix business, about around 12 or 13 years.
Q. How long have you been in Las Vegas, Nevada?
A. Thirty-nine years, 38 years.

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[19] • • • Q. Has there been a well drilled on the property?
A. There is a well drilled on it. There has been a well drilled on the lower part of it, and the tank has been installed to store the water and the pump, we made arrangements for the pumps and the pipe, which we have never put up, to raise the water up an additional 700 feet up the hill to the site of the aggregate, the gravel and sand.

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[33] • • • Q. Are there any springs on these minings claims that you are able to observe?
A. Any what?
Q. Running springs. Water?
A. No. No, the only water that there is any place is here [indicating], and up further here they went 1700 feet before they struck water. Here [indicating] they struck water about four or five hundred feet. They pump it up there. It is pumped from here [indicating] up there 700 feet.
Q. That is Charleston Stone Products, Inc?
A. Yes.
Q. And all his material here is suitable for concrete aggregate?

A. Yes.

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[41] • • • Q. Do you know why after Sullivan and Brawner ceased operations, nobody else went in there to start mining and removing?
A. No, I don't. The only thing is Morrison-Knudsen went in there after that and put that screening plant there, and what they did with the material, I don't know. They tried to sell it to us, but we couldn't use it because it wasn't washed, and there was no water or anything, so we [42] weren't interested.

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United States Department of the Interior, Bureau of Land Management

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Contest Nos. N–065729–A–Q and N–065731–A–B, (Involving Charleston Nos. 1 to 22 and Charleston 12A and 13A placer mining claims, situated in Secs. 34, 35, 36 T. 19 S. and in Secs. 3 and 4 T. 20 S., R 59 E., MD Meridian, Clark County, Nevada.)

UNITED STATES OF AMERICA, CONTESTANT

vs.

CHARLESTON STONE PRODUCTS, INC., CONTESTEE

Hearing Room No. 3-604, Federal Building, 300 South Las Vegas, Nevada, Tuesday, October 28, 1969.

The above-entitled matter came on for hearing, pursuant to Notice, at 9:00 a.m.

Before: GRAYDON E. HOLT, Hearing Examiner

Appearances:

Otto Aho, Esq., Field Solicitor, U.S. Department of the Interior, Room 2004, Federal Building, 300 Booth St., Reno, Nevada, appearing on behalf of the Contestant.

W. C. Lamoreaux, Esq., 174 East 8th South, Salt Lake City, Utah, appearing as counsel for the Contestee.

E. A. Hollingsworth, Esq., 555 South Center Street, Reno, Nevada, appearing as counsel for the Contestee.

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[200] JOHN W. GODFREY, called to the stand as a witness for and on behalf of the Contestee, being first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION

By Mr. HOLLINGSWORTH:

Q. Please state your name for the record, Mr. Godfrey.

A. John W. Godfrey.

Q. Where do you live, Mr. Godfrey?

A. Omaha, Nebraska.

Q. Are you familiar with the Charleston Stone Products Corporation?

A. Yes, sir.

Q. What is your relationship to the corporation?

A. At the present time I am the secretary of the corporation.

• • • • •

[207] • • • By Mr. HOLLINGSWORTH:

Q. Now, would you just briefly state what the Charleston Stone Products, Inc., has done as far as its attempts to develop the subject mining claims?

A. Well, the company has been aggressive in its effort to obtain orders for product in sufficient sizes to warrant the type of processing that is necessary there and in that connection they have expanded approximately $13,000 in the drilling of two wells, one which proved to be a dry well, and one which is a water producing well, and the water producing well has a submersible pump in it and it is a case well and has been drilled to a depth of approximately 700 feet with an 8 inch perforated casing and it was tested to produce approximately 350 gallons per minute, [208] as I recall, which really was the limit of the pump that the test was made with and the draw-down was minimal. This $13,000 represents a portion of the cost.

There was also installed a very large surge tank at the area of the pump and well and the area was fenced. There has been a certain amount of vandalism in the meantime that has reduced the amount of improvements in the area.

Q. Do you recall the drilling contractor that drilled the well?

A. McKinney and Sons, as I recall.

Mr. HOLLINGSWORTH. Your honor, I have several exhibits relating to the drilling of the well. Perhaps, we can introduce them all as one document, if you have no objection.

Mr. AHO. Point out where the well is located and upon your assurance that all these documents relate to that well, I will stipulate to their admission.

The WITNESS. The well is located——

Mr. AHO. You are marking on what exhiibt now?

The WITNESS. I am marking on Exhibit 6 and I am pointing to Claim 22, which previous testimony indicates the existence of a well in the southeast corner of Claim No. 22 and within the limits of Claim No. 22.

This is the producing well. The well which was drilled and did not produce water, occurred practically [209] between Claims 9 and 10, but within Claim 9 on the same exhibit.

The claim here, Claim 9 well, has been abandoned and I question if there is any evidence of its existence there today.

By Mr. HOLLINGSWORTH:

Q. Would you mark the dry well with a green circle and mark it "1" there.

A. The dry well in green in this exhibit?

Q. Yes. Now, would you mark the producing well also with a green circle and mark it "2"?

A. I have done that.

Q. You may sit down, if you will, please.

I show you several instruments and documents and ask you if these documents relate to the drilling and billing of the two wells that you have testified to?

A. The statements do refer to the drilling of the well which includes billing and contracts, as well as log information required by the State of Nevada and there is included in here a document which refers to the water drawn from the producing well and is actually a certificate of an analyses by the Department of Agriculture of the State of Utah, which certifies to the quality of the water and, with the exception of the chemical analysis, the rest of the documents do refer directly to the wells.

Mr. AHO. That is Well No. 2?

[210] The WITNESS. Well No. 1 and 2 are both concerned here.

HEARING EXAMINER. The documents will be marked as Exhibit Q and are received in evidence.

[Thereupon, the documents referred to above were marked as Contestee's Exhibit Q for identification and were received in evidence.]

Mr. HOLLINGSWORTH. Thank you.

By Mr. HOLLINGSWORTH:

Q. You mentioned, in reference to what you have marked as Well No. 2 on Exhibit No. 6, you are certain it existed in Claim No. 22 or within the exterior boundaries of Claim 22, why are you so affirmative or definite about that particular point?

A. This is a point I wanted to make sure was carefully cared for at the time the drilling was made. It would be a sad thing to drill a well, and for someone else. The well was located by a professional engineer who had a great knowledge of the Las Vegas area and, particularly, of the Charleston claims. His name was L. M. Bobeau, B-o-b-e-a-u, and he had previously done great work in the area when the Murphy and Pine's locations were first made and was responsible, as I recall, for the subsequent amount of the claims and placing them in conformity with the cadestral features of the land net. And, he located this and it was on an admonishment from me that this was done carefully and to my satisfac- [211] tion and to his.

Q. Did he also make a land status investigation?

A. Yes, sir, he did.

Q. Did he convey to the corporation the results of what he obtained?

A. Yes, sir.

Q. Do you know who he referred to when he made his——

A. All I knew was he was going to contact the B.L.M. Office.

Q. Do you know whether or not he did contact the B.L.M. Office?

A. Yes, sir. We have correspondence to indicate he has.

Q. Where is Mr. Bobeau at the present time?

A. Deceased.

* * * * *

CROSS EXAMINATION

[220] • • • Q. Now, are the purposes of drilling wells to obtain water on these claims?

A. The purpose was to provide water for the washing of material and for the servicing of a batch plant for readymix, which would eliminate the haul of aggregate material and then only be involved in the haul of the finished product, which would be transit-mix concrete.

Q. That would infer, then, washing would be necessary to get a good concrete aggregate, is that it?

A. To get, principally, to wash the sand, and sand, it isn't necessary for a good concrete aggregate to wash, but, as long as you are going to provide specification material, you must wash.

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[221–223] • • • • •

[224] HERMAN J. YOUNG, called as a witness for and on behalf of the contestee, being first duly sworn, was exhibited and testified as follows, to-wit:

DIRECT EXAMINATION

By Mr. HOLLINGSWORTH:

Q. Mr. Young, please state your name for the record.

A. Herman J. Young.

Q. Where do you live, Mr. Young?

A. 2001 Boise Avenue, Boise, Idaho.

Q. What is your present occupation or profession, Mr. Young?

A. I am superintendent of crushing and asphalt operations in the Boise District for Morrison-Knudsen Construction, Boise, Idaho.

• • • • •

[227] • • • By Mr. HOLLINGSWORTH:

Q. Now, I hand you exhibits—Exhibit S and ask you if these photographs represent the activities conducted by Morrison-Knudsen and by yourself during the period of time, 1962 until you ceased operations?

A. Actually, this erection started in 1961, in February, '61, and then the processing operation continued sporadically through '63.

Q. What was the purpose of the equipment on the property at that time?

A. It was our intent to check out the feasibility of [228] operating this pit for the processing of all types of construction aggregates, namely, base coarses, asphalt coarses, pouring cement, concrete.

Q. Did you have the use of any water during that period of time you were conducting the investigation?

A. No, sir.

• • • • •

[229] • • • Q. Were you able to produce any saleable product from the claims with the use of the equipment depicted on the photographs in Exhibit S?

A. Yes, I was. I separated the coarse aggregates into five sizes, and of course, the two inch to the maximum size of ten inch was a material indicated usage for leaching rock.

The two inch to the three-quarter size was a concrete coarse aggregate material, as well as the inch and a half to the three-quarter and the three-quarter to number 4, then.

The various materials, the sizes, would meet some of the designated specifications, but would not meet all of them without a blending process, and the sand, after the introduction of air facilities and a little rescreen set-up would meet the State Specifications for concrete sand. However, the production of this method was not feasible, due to the inability for greater production necessary for the expenditure of the equipment, therefore, requiring water to process concrete sand.

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[230] * * * Q. Had you been amply provided with the funds necessary to produce the aggregate, is it your opinion that you could have competed successfully in the Las Vegas Valley during that period of time?

A. I could have competed with the coarse aggregates with the current equipment I had.

Q. You could produce——

A. Not with additional equipment. I could have competed with the coarse aggregate, not the sand, but the coarse aggregate with the minimum amount of equipment that I had.

[231] Q. But, as to the other fraction of the aggregate, that would require additional equipment?

A. Processing by washing, mainly.

* * * * *

[249] * * * Mr. HOLLINGSWORTH. I will call Mr. Kaltenborn to the witness stand, please.

R. J, Kaltenborn, called as a witness for and on behalf of the Contestee, being first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION

By Mr. HOLLINGSWORTH:

Q. Would you please state your name for the record, Mr. Kaltenborn?

A. R. J. Kaltenborn, K-a-l-t-e-n-b-o-r-n.

Q. Where do you live, Mr. Kaltenborn?

A. 900 Rancho Circle, Las Vegas.

Q. What is your occupation and profession?

A. Well, at the present time I just sold an automotive parts business which I operated since '32 and I am doing [250] considerable building for myself. I am not—I do hold a general contractor's license, but I am not building for others, but for myself.

Q. Have you at any time ever been engaged in the construction business? For purposes other than your own?

A. I have.

Q. Are you familiar with the organization known as the Southern Nevada Industries?

A. I established it about 1940.

Q. Would you explain what the purpose of the corporation was? What type of business was it?

A. Well, we started out at the beginning to manufacture and had the first concrete block plant in Las Vegas. Then, we graduated into the readymix concrete business and prior to selling it, I believe, in 1946, we poured all the concrete on the magnesium plant, as well as a greater part of it on several of the hotels and public housing units constructed during World War II.

Q. Do you recall where you obtained your raw materials for the manufacture of concrete block and the concrete aggregate?

A. Well, from 19—I am sure it was 1940, we opened the pit. At that time it was called the Pine and Murphy pit and we did build the road up Lone Mountain Road to the base of Mount Charleston and we got our material from the pit [251] at the end of Lone Mountain Road, at the base of Mount Charleston.

Q. Are you familiar with the general location of the deposit you are referring to?

A. Yes, sir.

Q. Referring to Exhibit E, I ask you if the group of claims identified as the Charleston Claims as seen on the individual exhibits are generally in the area of the deposit from which you obtained the material?

A. Yes, sir.

Q. Do you know how far that deposit is from downtown Las Vegas?

A. Well, it is all according to—it is a pretty big town now, I think we figured at that time about 10 miles, 10 or 11 miles.

Q. Were you processing material at the deposit at that time?

A. No, sir. We hauled it to the corner of Tonopah Highway and what is now known as Lake Mead Boulevard, about a mile and a half north of Bonanza Road.

Q. The distance of 10 miles, which you gave, would be from the point of the plant?

A. I think that is what we considered to be about 10 miles to the plant at the corner of what was then called Coran, C-o-r-a-n Lane. It is now Lake Mead Boulevard and [252] Tonopah Highway.

Q. I notice you are handling certain photographs.

Mr. HOLLINGSWORTH. I wonder if we could have these marked, Mr. Examiner?

Hearing Examiner. All right, they will be marked as Exhibits T–1, T–2 and T–3.

[Thereupon, the photographs referred to above were marked as Contestee's Exhibits T–1, T–2 and T–3 for identification respectively.]

By Mr. Hollingsworth:

Q. I hand you Exhibits T–1, T–2, and T–3, marked for identification, and ask you if you recognize the scene depicted in the photographs?

A. Yes, sir. It is the place where we had our washing plant and crushing plant.

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[304] • • • Mr. Hollingsworth. I would like to call Mr. Wheeler.

Rae Alan Wheeler, Jr., called to the stand as a witness for and on behalf of the contestee, having been first duly sworn, was examined and [305] testified as follows, to-wit:

DIRECT EXAMINATION

By Mr. Hollingsworth:

Q. Mr. Wheeler, will you please state your full name for the record?

A. Rae Alan Wheeler, Jr.

Q. Where do you live, sir?

A. 3016 Colanthe, C-o-l-a-n-t-h-e Avenue, Las Vegas.

Q. How long have you lived in the Las Vegas area?

A. About 18 years.

Q. What is your occupation and profession?

A. I am in the trucking business. I have got two trucklines, interstate and intrastate.

Q. How long have you been engaged in the trucking business?

A. About 25 years.

• • • • •

[317] • • • Q. Do you know where the leach rock was coming from that you were hauling?

A. Yes, out of Brawner's pit. We were hauling probably about 3000 or 4000 tons a month there on that job.

Q. You stated this was going to which disposal plant?

A. It is on the end of Vegas Valley Drive.

Q. Would that be for the City or the County?

A. You mean who it belongs to?

Q. Yes.

A. I can't answer that.

Q. Who else did you haul material to and during what period of time?

Hearing Examiner. You mean from these claims?

Mr. Hollingsworth. From these claims.

The Witness. We hauled to the City of North Las Vegas. We hauled to Stocks' Sand and Gravel Company.

By Mr. Hollingsworth:

Q. Do you recall what kind of materials you hauled to Stocks' Sand and Gravel?

A. Sand.

Q. Do you recall approximately when that might have [318] have been?

A. 1956.

Q. Did Mr. Brawner have any water on the claims at that time?

A. No. He produced his material without water. He didn't have too much dirt in it.

Q. He was able to produce——

A. He was able to produce better materials than a lot of people would that were washing their material and he did it well without water.

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United States Department of Interior
Bureau of Land Management

Contest Nos. N–065729 A–Q and N–065731 A–B

United States of America, contestant

vs.

Charleston Stone Products, Inc., contestee

Deposition of Starr Hill, Jr., taken October 21, 1969, at Reno, Nevada

Appearances:

For the Contestant: Otto Aho, Field Solicitor, U.S. Department of the Interior, Room 2004 Federal Building, 300 Booth Street, Reno, Nevada.

For the Contestee: Echeverria & Osborne, by Ed Hollingsworth, 555 South Center Street, Reno, Nevada.

Reported by: Terry T. Blanco.

[3] • • • • •

DIRECT EXAMINATION

By Mr. HOLLINGSWORTH:

Q. Now, Mr. Hill, will you please state your full name?
A. Starr Hill, Jr.
Q. Where do you live, Mr. Hill?
A. Reno, Nevada.
Q. What is your present occupation or profession?
A. I am surface water engineer for the State of [4] Nevada.

• • • • •

Q. When did you receive your professional engineer's license?
A. In 1947.
Q. When were you issued the license, in the capacity of a land surveyor?
A. 1947.
Q. Do you belong to any professional organizations?
A. I am a registered engineer, professional engineer with the State of Nevada, and a member of the American Institute of Mining Engineers.

[5] • • • • •

Q. Could you relate briefly the type of activities that you were engaged in during the time you were employed by the Gypsum company and the Bureau of Mines and BLM?

A. Yes, by the Gypsum company, I was investigating, examining, making reports on non-metallic deposits in Nevada in which National Gypsum was interested in acquiring. The Bureau of Mines was with the safety branch. The work was the examination of mines in Arizona and New Mexico from the safety standpoint to make sure they qualified with federal regulations regarding same. The Bureau of Land Management, the valuation engineer, I was supervising valuation engineer from 1956 to probably 1959, in which I supervised two valuation engineers and one geologist other than myself in the examination of mining claims on public domain for the purpose of determining their validity, whether contests should be made, testifying in contests, also examination of metallic, non-metallic mines [6] to value them from a dollars and cents point of view. I guess that is all.

Q. In conjunction with your supervisory duties with the Bureau of Land Management, did you also make assignments of investigations by the other employees—

A. Yes, I did. I assigned the work to the other employees.

• • • • •

[25] • • • Q. Now, you mentioned that during the time you visited the so-called Brawner operation, that he did not have any water?

A. No, sir. He had no water.

Q. He was producing the type of materials that you referred to without the use of any water whatsoever?

A. Yes. He simply used vibrating screens and a crusher.

Q. Were any other operators in the Valley producing similar aggregates without the use of water?

A. No. At the time of our examination, none of the others were without water. They used water in their flow sheets in the processing of sand and gravel.

[26] Q. This is where concrete aggregate and plaster sand and mortar plant services?

A. Yes.

Q. Is it necessary to use water for the base course material and asphault mixes?

A. No. That would make a pretty expensive operation out of it to use water in your flow sheet for road base.

Q. Were any of the operations you observed using water in their flow sheets for the production of base course material?

A. I don't believe so.

Q. In other words, it was not the practice down there to process base course material in that manner?

A. No, it would make it too expensive.

• • • • •

[27] Q. Type of material, quality, quantity, suitability for use?

A. Yes, yes. In all the deposits, we secured an estimate of the size of the deposit. His was by far the deepest deposit, apparently the largest reserves of any we examined. The material seemed, as proved by the processing, dry processing, the material was of good size gradation. It took very little processing to make it qualified for concrete aggregate.

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[45] • • • Q. Based upon your experience as a practical miner and as a mining engineer, considering a deposit similar to the one Mr. Brawner was operating, would you state briefly how you would develop the deposit for [46] commercial exploitation?

A. I think he was limited somewhat in his market because of the lack of water.

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OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION

SEE FOLDOUT NO. 1

WELL LOG AND REPORT TO THE STATE ENGINEER OF NEVADA

PLEASE COMPLETE THIS FORM IN ITS ENTIRETY

Log No.
Rec. 19
Well No.
Permit No.
Do not fill in

Owner Charleston Stone Products Driller S.E. McKinney & Sons, Inc.

Address 133 North First West, Salt Lake City, Utah Address 1042 So. Main Lic. No. 45

Location of well: ¼ ¼ Sec. , T. N/S, R. E, in Clark County

or Charleston Placer Claim #22, NE-NE-SE-36-19-59

Water will be used for Quasi Municipal Total depth of well 700 feet

Size of drilled hole 12" to 50', 10" to 585 Weight of casing per linear foot 3/16"
8" to 700'

Thickness of casing 3/16" Temp. of water

Diameter and length of casing 8" ID from 0' to 600'
(Casing 12" in diameter and under give inside diameter; casing 12" in diameter give outside diameter.)

If flowing well give flow in c.f.s. or g.p.m. and pressure

If nonflowing well give depth of standing water from surface 442 feet

If flowing well describe control works
(Type and size of valve, etc.)

Date of commencement of well 5/17/62 Date of completion of well 6/19/62

Type of well rig Bucyrus Erie 22W

LOG OF FORMATIONS

From feet	To feet	Thickness feet	Type of material
0	8	8	gravel & rock
8	18	10	rock
18	25	7	boulders & grave l
25	35	10	boulders
35	39	4	boulders & clay
39	60	21	rocks & cemented gravel
60	442	382	cement gravel
442	455	13	cement gravel(water)
455	470	15	hard sand
470	585	115	gravel (water)
585	700	115	cement gravel(water)
ote from 670 to 685 smelly water			

EXHIBIT "Q"

The within is one of several pages constituting said Exhibit.

Water-bearing Formation, Casing Perforations, Etc.

Chief aquifer (water-bearing formation)
from 442 to 455 ft.
Other aquifers 470 to 585'
585 to 700'

First water at 442 feet.

Casing perforated
from 436 to 600 ft.

Size of perforations
3/16" X 10"

In the United States District Court for the District of Nevada

No. LV–2039—BRT

CHARLESTONE STONE PRODUCTS CO., INC., A CORPORATION,
PLAINTIFF

vs.

ROGER MORTON, SECRETARY OF THE INTERIOR, UNITED STATES OF AMERICA, DEFENDANTS

Complaint for Review

W. C. Lamoreaux, Attorney for Plaintiff, 174 East 8th South, 363–450, Salt Lake City, Utah.

Plaintiff complains against defendants as follows:

1. This is an action to review and reverse the decision of defendants above, and the Office of Hearings and Appeals, Interior Board of Land Appeals, IBLA 72–111 decided Jan. 18, 1973, a copy thereof being attached and made a part hereof. Jurisdiction is claimed on the basis of the ADMINISTRATIVE PROCEDURES ACT, Title 5, USCA No. 701 et seq. and also on Title 28 USCA sections 1361 and 1391(e) thereof.

2. Plaintiff is the owner of and has the right to possession of 25 sand and gravel placer mining claims of ancient origin, the same being located in Clark County, Nevada within the venue of the southern division of the above court. Attention is called to Number 73–1452 before the 9th Circuit Court of Appeals to prove diligence.

3. In 1942, 23 placer mining claims were located according to law in Clark County, Nevada and namer Charlestone, and Charlestone 1 to 22 inclusive by predecessors of plaintiff. Prior to July 23, 1955, and beginning with 1942 large extractions of sand and gravel aggregate materials were taken from said claims and were sold and incorporated into buildings, streets, sidewalks, gutters and other substantial improvements within Clark County, all for money. On and after July 23, 1955, sub-

stantial marketing from said claims continued, and development work done, the claims being assigned to plaintiffs. A very substantial developmental program of construction of a large plant facility with a lease of part of said claims to one of the largest purveyors of ready-mix concrete was effected involving expenditures in excess of $250,000 prior to the contest herein initiated. Marketability of aggregate from the entire deposit including all of said claims was accomplished at a profitable level.

4. In 1965 defendants contested the rights of plaintiff to the claims, and all marketing and developmental efforts came to a halt for reasons of said contest. Plaintiffs suffered a legal wrong because of said agency action.

5. An evidentiary hearing was had between the parties in which a record was taken as to the history of the claims and the bona-fides of development, all of which should come before this court on review.

6. Defendants have deprived plaintiff of its constitutional and statutory rights of due process of law in the following particulars, among others: the defendants have:

a. Been arbitrary and capricious and abused their discretion under law.

b. Violated the constitutional and statutory rights of plaintiff, and their privileges and immunities.

c. Defendants have operated in excess of their statutory authority and limitations, depriving plaintiff of lawful rights.

d. Defendants have operated without observance of procedure required by law.

e. Defendants actions and their findings and concusions and judgment are unsupported by substantial evidence.

f. The findings, conclusions and judgment attached are unwarranted by the facts, and are contrary to the facts and the law, and are not supported by substantial evidence, and the same must be reversed, except as to claim X which should be affirmed.

7. The attached decision is contrary to law and must be reviewed and reversed as aforesaid. Plaintiff has no remedy at law otherwise.

WHEREFORE, plaintiff prays this court shall review the record, the findings of fact, conclusions of law, and judgment, and reverse the same, and award to plaintiff all of their rights

to possession including their rights to Claim X and for costs and equitable relief. The action is filed out of caution to preserve all rights to plaintiff to contest government action, all rights of review and appeal being claimed and none waived.

E. A. HOLLINGSWORTH,
Attorney,
555 So. Center, Reno, Nevada.
W. C. LAMOREAUX,
Attorney,
174 East 8th South, Salt Lake City, Utah.

In the United States District Court for the District of Nevada

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Civil Action No. LV–2039–BRT

CHARLESTONE STONE PRODUCTS, CO., INC., PLAINTIFF

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

V. DeVoe Heaton, United States Attorney.

Assistant United States Attorney, Federal Building & Courthouse, 300 Booth Street, Room 5011, Reno, Nevada 89502; Telephone: (702) 784–5439; attorneys for the Defendants.

Answer

Defendants answer the complaint as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

1. The allegations in paragraph 1 consist of a description of the objective of the case and conclusions of law which require no answer.

2. Defendants admits plaintiff's right to possession of the Charleston No. 10 placer mining claim but deny the remainder of the allegation in the first sentence of paragraph 2. Defendants affirmatively assert that the action described as "Number 73–1452 before the 9th Circuit Court of Appeals" was dismissed for lack of jurisdiction on May 17, 1973.

3. Defendants admit the allegations in the first sentence of paragraph 3, except that the claims were named the "Charleston" claims rather than "Charlestone" claims, and the allegation that the claims were located according to law is a conclusion of law which requires no answer. Defendants deny the allegations in the second and fifth sentences of paragraph 3 and

are without knowledge or information sufficient to form a belief as to the truth of the allegations in the third and fourth sentences of that paragraph.

4. Defendants admit that the Government contested plaintiff's claims in 1965 but deny that plaintiff suffered a legal wrong thereby and are without knowledge or information sufficient to form a belief as to the truth of the allegation that all marketing and developmental efforts came to a halt as a result thereof.

5. Defendants admit the allegations in paragraph 5.

6. Defendants deny the allegations in paragraph 6.

7. Defendants deny the allegations in paragraph 7.

Defendants deny every allegation of the complaint which is not expressly admitted.

WHEREFORE, defendants respectfully request that the complaint be dismissed and that they be awarded their costs.

V. DEVOE HEATON,
United States Attorney.
E. PIERRE GEZELIN,
Assistant United States Attorney.

In the United States District Court for the District of Nevada

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Civil Action No. LV–2039–BRT

CHARLESTONE STONE PRODUCTS CO., INC., PLAINTIFF

v.

ROGERS C. B. MORTON, DEFENDANT

MOTION FOR SUMMARY JUDGMENT

V. DeVoe Heaton, United States Attorney.

E. Pierre Gezelin, Assistant United States Attorney, Federal Building and Courthouse, 300 Booth Street, Room 5011. Reno, Nevada 89502; Telephone: (702) 784–5439.

Robert Allen Zupkus, Attorney, Department of Justice, Washington, D.C. 20530.

Defendant's Motion or Summary Judgment

Defendant, by his attorney, moves this Court to grant summary judgment pursuant to Rule 56, F.R.Civ.P., on the grounds that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law.

This motion is based upon the complaint, answer, and the entire administrative record of the Department of the Interior relating to Nevada Contests 065729 A to Q inclusive and Nevada Contests 065731 A and B, entitled *United States* v. *Charleston Stone Products, Inc.*, which has been submitted with the affidavit of Newton Frishberg, Chairman, Interior Board of Land Appeals.

Respectfully,

V. DEVOE HEATON,
United States Attorney,
E. PIERRE GEZELIN,
Assistant United States Attorney,
ROBERT A. ZUPKUS,
Attorney,
Attorneys for Defendants.

In the United States District Court for the District of Nevada

---

Civil Action No. LV–2039–BRT

CHARLESTONE STONE PRODUCTS CO., INC., PLAINTIFF

v.

ROGERS C. B. MORTON, DEFENDANT

COUNTER MOTION FOR SUMMARY JUDGMENT

E. A. Hollingsworth and Warwick C. Lamoreaux, Attorneys for Plaintiff, Charleston Stone Products Co. Inc., 555 South Center Street, Reno, Nevada 89501; Telephone: 702–323–8678.

PLAINTIFF'S COUNTER MOTION FOR SUMMARY JUDGMENT

Plaintiff, by and through its attorneys, hereby counter moves this court for Summary Judgment, pursuant to Rule 56 FRCP on the grounds that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law awarding a possessory right to all of the claims.

This motion is based on the complaint, answer, and the entire administrative record taken at the hearing, and also additional data submitted with the affidavit of Newton Frishberg, Chairman, Interior Board of Land Appeals, which is before this Court but was not available to plaintiff until recently. Reference is made to certain elements thereof in the appendix to plaintiff's brief.

Respectfully,

EDGAR A. HOLLINGSWORTH,
WARWICK C. LAMOREAUX,
Attorneys for Plaintiff,
555 South Center Street,
Reno, Nevada.

In the United States District Court for the District of Nevada

---

Civil No. LV-2039 BRT

CHARLESTONE STONE PRODUCTS CO., INC., PLAINTIFF

vs.

ROGERS C. B. MORTON, DEFENDANT

[Received and filed Nov. 8, 9:23 AM 1974, John A. Porter, Deputy.]

Judgment

This matter came before the Court on cross-motions for summary judgment to review final agency action. The Court has concurrently herewith filed a Memorandum Opinion. Good cause appearing, *IT HEREBY IS ORDERED:*

The decision of the Interior Board of Land Appeals filed January 18, 1973 is vacated and set aside and the subject matter of this action is remanded to the Department of the Interior for further proceedings consistent with the Opinion filed.

Dated: November 7, 1974.

BRUCE R. THOMPSON,
United States District Judge.

United States Court of Appeals for the Ninth Circuit

No. 75-1532

CHARLESTONE STONE PRODUCTS CO., INC., A CORPORATION, PLAINTIFF-APPELLEE

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

[Filed Aug. 25, 1977, Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

Order

Appeal from the United States District Court for the District of Nevada

Before: TRASK and GOODWIN, Circuit Judges, and EAST,[1] District Judge

IT IS ORDERED that this Court's mandate upon the decision in the above-captioned case be stayed until September 10, 1977, or if a petition for certiorari is filed in the United States Supreme Court on or before that date, until denied by the United States Supreme Court, or if granted, until the matter is finally resolved by that Court.

---

[1] Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Supreme Court of the United States

No. 77-380

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

CHARLESTONE STONE PRODUCTS CO., INC.

[Filed November 28, 1977]

Order Allowing Certiorari

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Mr. Justice Blackmun took no part in the consideration or decision of this petition.

U.S. GOVERNMENT PRINTING OFFICE: 1978

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No. 77 380

In the Supreme Court of the United States

October Term, 1977

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner

v.

CHARLESTONE STONE PRODUCTS, CO., INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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October 1977

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In the Supreme Court of the United States

October Term, 1977

No. 77 380

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner

v.

CHARLESTONE STONE PRODUCTS, CO., INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion delivered in the court below is appended to the Petition for Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

The question presented by the Petition is collateral and immaterial to the case below.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Petitioner does not seek a review of the facts in this case, such being set forth in the opinions of the Courts below. Petitioner seeks only a review of a collateral statement by said court, not a reversal of the decision validating the several claims of respondent.

ARGUMENT

The Petition for a Writ of Certiorari does not seek a review of the decision of the Circuit Court of Appeals on the principal issues of this case. Twelve long years ago the Secretary of Interior initiated the action contending that the sand and gravel placer mining claims near Las Vegas, Nevada, held by respondent Charlestone Stone Products Co., Inc., were invalid for want of a timely discovery of a valuable mineral prior to July 23, 1955, the date common variety minerals became no longer locatable. The issue became one of fact and the Secretary of Interior based his entire case upon the testimony of one Donald G. Fisher. In the opinion of the United States Court of Appeals for the Ninth Circuit (553 F.2d 1209), set forth on page 7a of Appendix A, petitioner's brief, the following is excerpted:

> "Nine years later the Secretary employed Donald G. Fisher (Fisher)[4] a mining engineer, to investigate and report on the validity of the Charleston claims. Fisher gathered hearsay information from competing

[4] "Fisher had been previously employed by the Secretary in connetion with other contests of sand and gravel claims within the Las Vegas vicinity."

> sand and gravel operators in the area and made a visual examination of the claims in 1965, some ten years after the crucial date of July 23, 1955. Based upon his investigation, Fisher opined that all of the Charlestone claims were invalid for want of a discovery. The Secretary then used the Fisher report as a basis for the contest proceedings."

Both the district court below and the circuit court of appeals characterized the value of the testimony of Donald G. Fisher. The District Court stated:

> "The case for the Government before the Administrative Law Judge was rested on the testimony of Donald G. Fisher, a qualified mining engneer, whose opinion that all the claims were invalid was obviously of little weight because he was not thoroughly familiar with the history of the claims and the mining activity on the clams and had little or no knowledge of the economics of the market respecting sand and gravel in the Las Vegas Valley where the claims were located." (Petitioners brief, App. B, pp. 20a-21a.)

The Circuit Court stated:

> "Fisher's opinion, on which the Secretary exclusively relies, neither avoids the inadequacies noted in Verrue, supra, nor is it supported by the other facts in the records • • • In light of these factors, we must conclude that the Board improperly credited Fisher's unfounded opinion of nonvalidity." (App. A, p. 11a)

Petitioner does not seek to set aside the determination by the court below of the validity of the claims as established by the facts in the case, and in fact on page 8 of their petition in the footnote they openly concede such:

> "The Ninth Circuit's standard of judicial review of mining claim decisions, as exemplified in this case,

> threatens to hamstring the Secretary of the Interior in the discharge of his responsibility to see that only valid mining claims are recognized and that the rights of the public in the public lands are preserved. See Cameron v. United States, 252 U.S. 450, 459-460. *While we do not regard the error in this case as significant enough to warrant seeking review on this ground, we have noted it because, if the trend of decisions it illustrates continues, we may ask the Court to review the issue in another case.*" (Emphasis added.)

Since the Secretary of Interior uses the foregoing footnote to air his grievance with the "standard of judicial review of mining claim decisions" by the Ninth Circuit Court of Appeals, this respondent respectfully submits that it is indeed fortunate that the courts carefully weigh and consider the facts of a case, thus preserving the rights of citizens of the United States even though such allegedly threatens to "hamstring" the Secretary of the Interior in what he personally considers his rights or duties, including the right to threaten the Ninth Circuit Court that if they do not change the trend of their decisions the Secretary of Interior *might* ask this honorable court to review the issue in another case.

Petitioner now asks this court to review the simple question of "whether water is a locatable mineral under the mining laws of 1872." On page 6 of petitioner's brief, petitioner admits that "the parties had neither briefed nor argued this question." Here petitioner is not attacking the finding of the district court that Charlestone should have access to the water on claim 22, in fact admitting that such right existed under the laws of the state of Nevada; and in fact the only matter sought to be reviewed here is the "Question Presented" which, at most, could be characterized as *obiter dicta*. Such is clearly beyond the points involved and the issues in this case, and standing by itself should not be considered of sufficient merit upon which to grant a writ of certiorari. *Humphrey's Executor v. United States,* 295 U.S. 602, 79 L. Ed. 1611 (1935). Respondent respectfully submits to this court that after the lengthy hearings and litigation in this matter consuming twelve years of time at extraordinary costs and economic loss to the respondent, petitioner should not now be allowed to use this case to air his grievance with the Ninth Circuit Court of Appeals on a statement which is beyond the fundamental issues determined by the courts below. Petitioner fears that the statement of the Court of Appeals that such would "unsettle the law of water rights" should be considered in the light of *United States v. Carver,* 260 U.S. 482, 43 S. Ct. 81, 67 L. ed. 361, 1922, where this court stated:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

We further respectfully submit that this court should not consider the assigned error in this case as significant enough to warrant review, for surely petitioner, at his discretion, may ask this court to review this particular issue in *another case* where such issue is briefed, argued, and squarely met.

CONCLUSION

For the reasons stated above, Respondent says that a Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WARWICK C. LAMOREAUX
Counsel for Respondent
174 East 8th South St.
Salt Lake City, Utah 84111

October 1977

Supreme Court, U. S.
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No. 77-380

In the Supreme Court of the United States

OCTOBER TERM, 1977

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER
v.
CHARLESTONE STONE PRODUCTS CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-380

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

CHARLESTONE STONE PRODUCTS CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–17a) is reported at 553 F. 2d 1209. The opinion of the district court (Pet. App. C, pp. 19a–27a) is not reported. The decision of the Interior Board of Land Appeals (Pet. App. D, pp. 28a–58a) is reported at 9 IBLA 94.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 18a) was entered on May 12, 1977. On August 1, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and includ-

ing September 9, 1977, and the petition was filed on that date. The petition was granted on November 28, 1977 (A. 32A). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether water is a locatable mineral under the mining law of 1872.

STATUTES INVOLVED

Section 9 of the Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51, provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *.

Section 17 of the Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52, provides:

> All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title.

Section 1 of the Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22, provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the

> United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

STATEMENT

Since 1866 the federal mining laws have permitted citizens to seek, discover, and extract valuable minerals on the public domain and to secure fee title to lands containing such discoveries. Act of July 26, 1866, 14 Stat. 251; see *Cameron* v. *United States*, 252 U.S. 450, 460. Under the mining law of 1872 (Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*), which remains the basic law governing mineral claims, the claimant must establish that he has discovered a valuable mineral deposit within the limits of each claim. *Cole* v. *Ralph*, 252 U.S. 286, 295. The test for value is the "prudent man test," *Chrisman* v. *Miller*, 197 U.S. 313, 322, augmented by the marketability test, *United States* v. *Coleman*, 390 U.S. 599, 602–603. The combined tests require evidence of a mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable expectation that the minerals from the claim could be

255-025—78——2

marketed at a profit. In 1955 Congress withdrew "common variety" minerals such as sand and gravel from location under the mining laws. Act of July 23, 1955, Section 3, 69 Stat. 368, as amended, 30 U.S.C. 611. Consequently a claimant to a deposit of such minerals must show that there was a valuable discovery prior to the 1955 withdrawal date, *Cameron* v. *United States*, 252 U.S. 450, 462, as well as at the time of the administrative hearing. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336.

The Secretary of the Interior initiated this proceeding in 1965, contending that each of 25 sand and gravel placer mining claims [1] near Las Vegas, Nevada, held by respondent Charlestone Stone Products Co., Inc.,[2] was invalid for want of a discovery of a valuable mineral prior to July 23, 1955, the date common variety minerals became no longer locatable.[3]

The claims in question, which were originally located in 1942 by A. M. Murphy and Fred Pine,[4] lie

[1] A placer mining claim is a claim for a mineral deposit that is not in the form of a vein or lode. Placer claims are permitted on the public lands pursuant to 30 U.S.C. 35.

[2] The claims were the Charlestone, Charlestone Nos. 1–22, and Nos. 12A and 13A (Pet. App. D, p. 33a). The courts below apparently overlooked the Charlestone, as they refer to only 24 claims. (Although the name on the claims is actually "Charleston," and both the claims and respondent were so denominated in the administrative record (see Pet. App. D, p. 33a), in the courts below respondent has used the name "Charlestone," and those courts have applied this spelling to the claims as well as to respondent. We do the same to minimize confusion.) A map of the Claims is reproduced at A. 23A–24A.

[3] Act of July 23, 1955, Section 3, 69 Stat. 368, as amended, 30 U.S.C. 611.

[4] Claims 12A and 13A were not located until 1961 (Pet. App. D. p. 33a). See note 7, *infra*.

in a narrow wash on public land fifteen miles northwest of Las Vegas (Pet. App. D, p. 33a). They cover 490 acres of land and encompass a massive deposit of sand and gravel containing at least twenty million cubic yards of material (*ibid.*). Prior to 1955 material was removed from the claims during two periods. From 1942 to 1943 Southern Nevada Industries, Inc., extracted between 75 and 100 thousand cubic yards of material for use in the making of concrete blocks and the wartime construction of runways at nearby Nellis Air Force Base (Pet. App. D, pp. 34a–35a). In 1954 E. H. Brawner leased the claims, agreeing to pay Murphy and Pine ten cents per cubic yard for all material removed, and guaranteeing two hundred dollars per month. By 1956 Brawner had produced approximately fifteen thousand yards of material, operating from a pit located on Claims 9 and 10 (Pet. App. D, p. 35a). Brawner's operation was located farther from Las Vegas than any other operating deposit in the area and it was the only operation that had no water available to wash the material (A. 21A; Pet. App. D, p. 36a). In 1959 Brawner's lease was cancelled as a result of nonpayment of royalties (Pet. App. D, p. 36a).

Respondent acquired the claims on January 4, 1960, and in 1962 discovered water on Claim 22 (Pet. App. A, p. 5a; Pet. App. D, p. 45a; Pet. App. C, p. 23a). In 1964 respondent leased Claims 1–16 to Arden Sand & Gravel Company for a minimum royalty of twelve thousand dollars per year (Pet. App. D, p. 45a; Pet. App. C, p. 23a).

In the administrative contest initiated by the Secretary, the issue was whether respondent could prove that a valuable and marketable discovery had been made on the claims prior to July 23, 1955 (and existed at the time of the hearing).

The government presented one witness, Donald Fisher, a mining engineer. Fisher had examined the claim sites in 1965 and 1969, had reviewed the relevant mineral reports, and had interviewed both past and present sand and gravel dealers in the area (Pet. App. A, p. 7a; Pet. App. D, pp. 41a–42a). Fisher's testimony indicated that when he examined the claims in 1965, no sand and gravel had ever been removed from 15 of the 25 claims, namely, the Charlestone and Nos. 1, 2, 3, 5, 8, 11, 12, 12A, 13, 13A, 15, 19, 20, and 22 (See Pet. App. D, pp. 42a, 53a). He estimated that the removals from the other claims had been as follows (Pet. App. D, p. 42a):

Claim No.:	Amount (in cubic yards)
4	1,370
6	100
7	55
9	4,485
10	84,400
14	37,700
16	15,615
17	24,485
18	350
21	2,830

Fisher testified that the excessive haul distance to the market and the lack of washing facilities would

have prevented profitable operation of the claims prior to 1955, and he therefore concluded that all of the claims were invalid for want of a discovery of a valuable mineral prior to July 23, 1955 (A. 21A–22A; Pet. App. D, pp. 42a–43a). The government also introduced a Bureau of Land Management report prepared in 1961 which stated that Brawner, who had leased the claims in 1954, had ceased operations in 1958 because of the excessive haul distance (Pet. App. D, p. 43a).

Respondent presented a number of witnesses who had observed or taken part in removals of material from certain of the claims.[5] Respondent also introduced a marketability study of the Las Vegas Valley sand and gravel industry prepared in 1956 by two Bureau of Land Management employees (Hill and Lovejoy) (Pet. App. D, p. 35a), and the deposition of one of the authors of that report, Starr Hill, Jr. Hill stated that in his opinion at the time of the

[5] These witnesses included Rae Allen Wheeler, a trucker, who testified that he had removed 3,000–4,000 tons per month from mid–1954 to 1958 from certain of the claims; Vernon Frehner, a contractor and trucker, who testified that he had hauled approximately 5,000 cubic yards from 1954 to 1957, or 1956 to 1957; and H. Guy Jacka, who testified that he had purchased several thousand tons of rock chips annually from 1954 to 1958 (Pet. App. D, pp. 43a–45a). Respondent also introduced the deposition of Harrison S. Stocks, who testified that he had used material from the area of the claims for more than 30 years and that he had removed fairly large quantities from six of the claims; he also stated, however, that between 1948 and 1964 he had had little interest in the claims. Other witnesses testified to later removals (*id.* at 44a–46a). See *id.* at 53a–55a for the discussion by the Interior Board of Land Appeals (IBLA) of the weight it accorded this evidence.

report, the Charlestone claims were valid (Pet. App. D, p. 57a).[6]

On this evidence the administrative law judge found that the sand and gravel on the claims were common variety minerals, and that respondent had established the discovery of a valuable mineral by the critical date only with respect to Claim 10 (see Pet. App. D, p. 32a). The Interior Board of Land Appeals (IBLA) affirmed (Pet. App. D, p. 58a).[7]

The United States District Court for the District of Nevada vacated and set aside the administrative decision (Pet. App. C, pp. 19a–27a). The court held (1) that the testimony of the Secretary's only witness, the mining engineer Fisher, should not

[6] The IBLA concluded that Hill's general statement was insufficient to validate all of the claims (Pet. App. D, p. 57a). It found that Hill's opinion was premised on the theory, espoused by respondent, that proof of marketability on one claim would validate all the claims on that deposit (*ibid.*). The IBLA rejected that contention, noting that it would permit a person to locate an entire desert and establish its marketability by selling sand from one claim (*id.* at 40a).

[7] The administrative law judge also held Claim 9 valid as a reasonable reserve for Claim 10, but the IBLA reversed because there was no independent evidence of marketability regarding Claim 9 (Pet. App. D, pp. 52a–53a).

The administrative law judge found that Claims 12A and 13a, which were located after the effective date of the Act of July 23, 1955, were void *ab initio* (Pet. App. D, pp. 33a, 49a). These findings were affirmed by the IBLA and by the district court (Pet. App. D, p. 49a; Pet. App. C, p. 25a). Respondent acknowledged in the court of appeals that the materials on its claims were common varieties and that Claims 12A and 13A were therefore invalid (Pet. App. A, p. 2a n. 1).

have been credited by the administrative tribunals on the issue of marketability, since he was not personally conversant in 1955 with the local market for sand and gravel from the claims (*id.* at 20a–21a); and (2) that the successful drilling of a water well on Claim 22 in 1962 and the leasing of Claims 1–16 in 1964 at a minimum annual royalty of $12,000 were substantial evidence that material could have been extracted from these claims at a profit prior to July 23, 1955 (*id.* at 24a). Accordingly, the court decided that "at least" Claims 1–16 were valid, and that respondent must be permitted access to the water it had discovered on Claim 22 so that the water could be "made available to the operations on the valid claims" (*id.* at 26a).

The court of appeals affirmed (Pet. App. A, pp. 1a–17a), with one significant addition: It held that Claim 22 was also valid, because the water respondent had discovered on that claim was, the court concluded, a locatable mineral. The parties had neither briefed nor argued this question. The court stated: "We are satisfied that Charlestone * * * had the right to appropriate and utilize as a mineral the water within any of the claims which met the above two prong test of value and success in development" (*id.* at 15a). It noted that "[s]ince early times, water has been regarded as a mineral," and observed that the federal mining statutes which allow the location of placer

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claims "do not expressly define water as a nonmineral" (*id.* at 15a–16a). Because "the successful recovery of many 'hard' minerals from the earth and the utilization of the soft mineral of water therewith go hand in hand," the court declined to assume "that Congress was not aware of the necessary glove of water for the hand of mining * * * [or that] Congress impliedly intended to reserve water from those minerals allowed to be located and recovered" (*id.* at 16a). The court pointed out that water was not named as one of the common varieties of minerals that were withdrawn from location as of July 23, 1955, so "it is of no importance that the discovery of water within Claim 22 occurred after" that date (*id.* at 16a–17a).

The water on Claim 22 "undeniably has an intrinsic value in the desert area," the court continued, although there was "no evidence of a profitable market of the water per se for either domestic or irrigation uses" (*id.* at 17a). Since the water could be used to wash the sand and gravel from respondent's other claims, and since there was a profitable market for washed sand and gravel, the court held that "Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid" (*id.* at 17a).

SUMMARY OF ARGUMENT

1. The general mining laws, since their inception in 1866, have provided separately for the right to mine valuable minerals and for the acquisition of water rights. Congress recognized from the outset the critical role of water in mining operations. But instead of establishing a statutory system to govern the acquisition of private water rights on public lands, Congress chose to sanction rights recognized under the state and local laws that had been developed in the arid regions to allocate water among competing uses, including mining.

The general mining laws enacted in 1866 and 1870 contained separate provisions regarding water rights. These provisions were left unchanged by the 1872 mining law (30 U.S.C. 22 *et. seq.*), which remains the basic law governing mineral claims, and they are now codified in 30 U.S.C. 51 and 52. Section 51 provides that rights that are acquired "by priority of possession" to the use of water on the public lands, and that are "recognized and acknowledged by the local customs, laws and decisions of the courts," are to be "maintained and protected." Section 52 provides that "[a]ll patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights * * * acquired under or recognized by section 51 * * *."

Congress thus has expressly provided in the mining laws that the acquisition of private water rights on public lands is to be governed by state and local law, and not by the mining laws themselves. In a line of cases beginning soon after adoption of the mining laws, this Court recognized that these statutory provisions "confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-

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land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain." *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155. This legislative choice was not surprising, since the water law of the Western States had been developed in large part to meet the needs of miners.

These specific provisions for the acquisition of water rights under state and local law preclude any inference that Congress intended the federal law of mining claims to govern the acquisition of water rights. The court of appeals, however, was apparently unaware of these provisions. It relied on the general proposition that water is a mineral, and the observation that the mining laws do not expressly exclude water from the definition of the term "mineral." The court's interpretation of the mining laws to permit the location and patent of mining claims to water disregards the distinction Congress drew between water rights and mineral claims, and leaves Sections 51 and 52 as mere surplusage.

Giving the term "mineral" its broadest definition in the context of the mining laws—a definition that includes common stone, dirt, and earth—makes nonsense not only of the mining laws, but of many other public-land laws as well. Under this interpretation all public lands would have been "mineral" lands open to entry under the mining laws, and there would have been no need for agricultural entry laws, such as the homestead and desert entry acts.

2. Even if the statutory scheme of the mining laws were not clear on its face, the administrative decisions of the Department of the Interior have consistently held that water is not a locatable mineral, and that acquisition of water rights on public lands is not governed by the federal mining laws. These decisions of the officers charged with the administration of the public land laws are entitled to great deference, and should be well-nigh conclusive where, as here, the interpretation has prevailed for more than a century and has served as the basis for a system of settled property rights.

In reliance on the clear mandate of the statutes and on the decisions of both the Department of the Interior and this Court, many thousands of persons seeking water rights on public lands have followed the procedures prescribed by state and local law. Affirmance of the decision below would cast doubt on rights long thought to be established, and would unsettle the water law of the Western States.

Moreover, permitting the location and patent of mineral claims to a substance as common and widespread as water would invite abuse of the mining laws by persons seeking to acquire public lands for non-mining purposes. In the view of the Department of the Interior, permitting the location of mineral claims for water would threaten a repetition of the abuses that occurred in the past in connection with other common minerals, such as sand and gravel, and that caused Congress to remove them from location under the mining laws.

ARGUMENT

I. THE MINING LAW OF 1872 SHOULD NOT BE CONSTRUED TO PERMIT THE LOCATION OF WATER AS A MINERAL BECAUSE THE MINING LAWS THEMSELVES, AND OTHER PUBLIC LAND LAWS, PROVIDE THAT STATE AND LOCAL LAW GOVERNS THE ACQUISITION OF WATER RIGHTS

A. THE GENERAL MINING LAWS HAVE ALWAYS PROVIDED THAT THE ACQUISITION OF WATER RIGHTS IS GOVERNED BY STATE AND LOCAL LAW, NOT BY THE FEDERAL MINING LAWS

The federal mining laws since their inception have provided separately for the right to mine valuable minerals and for the acquisition of water rights. This duality precludes any inference that Congress intended water to be locatable as a mineral under these laws. Congress recognized the critical role of water in mining operations. But instead of establishing a statutory system to govern the acquisition of water rights on the public lands, Congress chose to ratify the rights recognized under the state and local laws that had been developed in the arid regions to allocate water among competing uses, including mining. To construe the provisions of the federal mining laws governing the location and patent of mineral claims as applicable to water would defeat Congress's intent to allow state and local law to govern the acquisition of water rights, and would make the provisions of the federal mining laws that deal with water rights mere surplusage.

In 1866, in the first general mining law,[8] Congress tablished the pattern of treating water rights sepa-

[8] Prior to 1866 Congress had passed a number of limited measures permitting the lease, and in a few cases the sale, of specified

rately from mining rights. The Act of July 26, 1866, 14 Stat. 251, opened the mineral lands of the public domain for exploration and occupancy and permitted the location and patent of lode or vein claims on certain conditions.[9] With regard to water rights, however, the Act declared that rights that had been acquired "by priority of possession" to the use of water on public lands, and that were "recognized and acknowledged by the local customs, laws, and the decisions of the courts," were to be "maintained and protected." Section 9 of the Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51.[10] When placer claims were made subject to location and patent in 1870, Congress followed the pattern of distinguishing between the mining rights governed by the federal statutes and water rights. Section 17 of the Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52, provided that "[a]ll patents granted, or homesteads allowed, shall be subject to any vested and accrued

tracts of mineral lands, particularly for lead and copper mining. See Gates, *History of Public Land Law Development* 703–716 (1968); Hibbard, *A History of the Public Land Policies* 512–517 (1939).

[9] The claimant had to observe certain posting and filing requirements and expend at least $1,000 in labor and improvements.

[10] No printed committee report was prepared in connection with the Act, and the debates did not focus on Section 9 or its relation to other provisions of the Act. See Cong. Globe, 39th Cong., 1st See Gates, *History of Public Land Law Development* 703–716 4054 (1866). The history of these provisions is discussed in Gates, *supra*, note 8, at 716–719.

water rights" acquired or recognized under the 1866 law.[11]

When Congress enacted the Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*, which is still the basic law governing mineral claims, it superseded portions of the earlier acts, but it left unchanged the water rights provisions enacted by Section 9 of the 1866 Act and by Section 17 of the 1870 Act. See Sections 9, 10, and 12 of the 1872 Act, 1 Stat. 94–95.[12] Those provisions are now codified as 30 U.S.C. 51 and 52.

In a line of cases beginning soon after the adoption of these mining statutes, this Court has consistently read these statutes as expressing Congress's intention to allow state and local laws to govern the acquisition of water rights on the public domain, for purposes including but not limited to mining. In *Basey* v. *Gallagher,* 20 Wall. 670, 683–684, decided in 1874, the Court observed that the mining law of 1866 was intended "to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition," and which was evidenced by

[11] Section 17 was introduced as a floor amendment, which its sponsor proposed in order to ensure that the 1870 legislation would not affect the rights secured under the 1866 legislation. It was adopted with virtually no discussion. Cong. Globe, 41st Cong., 2d Sess. 2030 1870). No committee report is available.

[12] The debates contain no discussion of water rights. See Cong. Globe, 42d Cong., 2d Sess. 532–535, 2456–2462, 2897–2899 (1872). No committee report is available.

"local customs, or by the legislation of the State or Territory, or the decisions of the courts." See also *Atchison* v. *Peterson,* 20 Wall. 507; *Jennison* v. *Kirk,* 98 U.S. 453; *Broder* v. *Water Company,* 101 U.S. 274. The Court returned to these provisions of the 1866 and 1870 laws in *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142, 155, where it held:

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

It is not surprising that when Congress enacted the general mining laws it chose to sanction the rights acquired under state and local law, for the water law of the western mining states had evolved in large part to meet the needs of the miners who settled those areas. The development of the doctrine of prior appropriation has been described in McGowen, *The Development of Political Institutions on the Public Domain,* 11 Wyo. L.J. 1, 14 (1956), as follows:

> [T]he mining districts are of current significance not only because of the law of mining but also because of the law of water which owes its origin to them. A good many of the mines in California were placer mines. Water is essential to the operation of a placer mine. But a

great many of these placer mines were situated a considerable distance from the stream and frequently entirely beyond the drainage of the stream. Just as there were not enough mines for all the people, there was not enough water for all the mines. Now the Anglo-American doctrine of riparian water rights was established on the premise that water belonged to the owner of the land adjacent to the stream and that while each land owner had a right to use the water still he was obligated to return it to the stream undiminished in quality and quantity for his neighboring riparian owner immediately below him on the stream. Such a law was of course worked out to meet the economic needs of a group of eastern factory owners and mill operators. It was a law made in a damp moist country, and simply did not fit the needs of the western miners. Hence, they were again thrown upon their own resources to work out a system wherein the greatest amount of good could be obtained from the limited amount of water.

The miners met this problem just as they met the problem of adjusting the right to use a limited number of mines among a multitude of people. They applied the doctrine of prior appropriation to the water just as they did to the mining claims, and they limited the amount of water each person could use to the amount that he originally appropriated from the stream to operate his mine. The size of the ditch was used to determine the quantity of water originally taken. They also decreed that a failure to use the water for a given time worked an abandonment of the right to take the water just as a failure to work the mine worked an abandonment of the mine.

It was soon discovered by those who went to farm that the water law as worked out by the miners was much more appropriate to their needs in such a[n] arid country than the riparian rights which their ancestors had worked out in the humid East. Hence, the law of water, as originally worked out in the mining districts of California was soon to become the water law of the entire arid west.[13]

In enacting the mining laws Congress chose to give federal approval to rights recognized under this system of state and local law—which was uniquely suited to the needs of the mining community—rather than to establish a federal law of water rights. See *Jennison* v. *Kirk, supra,* 98 U.S. at 456–461; *Basey* v. *Gallagher, supra,* 20 Wall. at 681–684.[14]

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[13] The appropriative doctrine does not, however, govern every aspect of water law in the Western States. It has been recognized in 17 Western States, but certain of these States continue to recognize the riparian doctrine, or at least the existence of some riparian rights, as well. See Hutchins, *Selected Problems in the Law of Water Rights in the West* 30–34 (1942). Additionally, state law in many cases distinguishes between ground and surface waters, and between various types of ground waters (underground streams, percolating waters, artesian wells). See *id.* at 146–151. Congress sanctioned rights acquired under state and local law, but it did not require the States to adopt any particular water law doctrines. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163–164.

[14] This construction of the mining laws is universally accepted by the authorities on water law. One leading treatise, 2 Clark,

B. OTHER PUBLIC LAND LAWS FOLLOW THE PATTERN OF THE MINING LAWS

Other public land laws followed the pattern established in the general mining laws, recognizing that state law governs the acquisition of private water rights on public lands.[15] These enactments include the

Waters and Water Rights 53 (1967), analyzes the provisions at issue as follows: "The mining laws of the United States and the laws covering waters date from the same period in United States history. But under the mining laws the United States established procedures for acquiring rights from the United States; the passive policy reflected in the laws pertaining to water rights resulted in water rights being acquired through territorial and state law procedures. In other words, Congress enacted specific national mining laws which could be supplemented by local law not inconsistent with United States law. With respect to water, Congress merely established a policy of recognizing rights acquired through local procedures."

See generally Hutchins, *Selected Problems in the Law of Water Rights in the West* 64–74 (1942), I Wiel, *Water Rights in the Western States*, §§ 94–108 (3d ed. 1911). A study prepared for the National Water Commission reaches a similar conclusion. See Trelease, *Federal-State Relations in Water Law* 74–76 (1971). Mining law treatises likewise recognize that water rights are obtained under state law. *E.g.*, 3 Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands*, § 838 (1914); Ricketts, *American Mining Law*, §§ 80, 81, 84 (1943 ed.); Morrison, *Mining Rights on the Public Domain* 229–231 (1936).

[15] In addition, many Acts dealing with federal programs and projects include provisions disclaiming any intent to affect or interfere with state laws relating to the control, appropriation, use, or distribution of water, or with vested rights acquired under those laws. Provisions of this nature are found in the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. 383; the Federal Power Act, 41 Stat. 1077, 16 U.S.C. 821; the Submerged Lands Act, 67 Stat. 30, 43 U.S.C. 1311(e); and the legislation authorizing the Boulder Canyon Project, 45 Stat. 1062, 54 Stat. 779, 43 U.S.C. 617g, 618m. See generally Trelease, *Federal-State Relations in Water Law* 76–80 (1971).

Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. 321; the National Forest Act of 1897, 30 Stat. 36, 16 U.S.C. 481;[16] and the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b.[17]

Perhaps the most pertinent is the Desert Land Act, which made the desert lands in a number of Western States available for purchase by persons who would irrigate them, and provided that a claimant's right to the use of water for irrigation "shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation" (Section 1, 43 U.S.C. 321). Section 1 of the Act also provides that—

> all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for ir-

[16] The National Forest Act provides (30 Stat. 36, 16 U.S.C. 481): "All waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations thereunder."

[17] The Taylor Grazing Act provides, in pertinent part (48 Stat. 1270, as amended, 43 U.S.C. 315b): "* * * *Provided further*, That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law."

rigation, mining, and manufacturing purposes subject to existing rights.

This Court considered these provisions in *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra,* 295 U.S. at 162, and concluded:

> The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location. [Emphasis in original.]

This construction of the Desert Land Act was recently reaffirmed and followed in *Cappaert* v. *United States,* 426 U.S. 128, 143–145, where the Court noted that "the

water rights of those who received their land from federal patents are to be governed by state law."

C. IT WOULD DEFEAT THE CONGRESSIONAL INTENT EXPRESSED BY THESE STATUTES IF THE MINING LAW OF 1872 WERE CONSTRUED TO PERMIT THE LOCATION OF WATER AS A MINERAL

It is true, as the court of appeals noted (Pet. App. A, p. 16a), that Congress nowhere expressly provided that the term "mineral" in the mining law of 1872 should not be construed to include water. But Congress made its intention clear by providing in that statute for the acquisition of water rights under state law (by reaffirming Section 9 of the 1866 Act and Section 17 of the 1870 Act, now codified as 30 U.S.C. 51 and 52).[18] The court of appeals did not discuss these water-rights provisions, and indeed it appears to have grounded its analysis on the false assumption that the mining laws made no specific provision for water rights. From this incorrect premise the court reasoned that it should construe the mineral location provisions to apply to water, since it would be "incongruous for us to hazard that Congress was not aware of the necessary glove of water for the hand of mining" and had not provided for the acquisition of water rights (Pet. App. A, p. 16a). The decision below thus rests on apparent ignorance of the special provision Congress made for the acquisition of water rights under state law.

Contrary to the court of appeals' belief that it was advancing the purpose of the mining laws, its inter-

[18] See page 16, *supra.*

pretation of the mineral-claims provisions as applicable to water renders the provisions dealing specifically with the acquisition of water rights superfluous. Its decision thus offends "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott, and Dunning*, 412 U.S. 609; 633; *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, 420 U.S. 395, 402–403. Substituting mining claims for the law of prior appropriation as the means of acquiring water rights would defeat Congress's intent to sanction the state and local law of prior appropriation that had evolved in response to the special needs of the arid western mining region.

To allow the acquisition of water rights through mining claims would produce results quite different from those reached under the doctrine of prior appropriation. It is a distinguishing feature of this doctrine—and a critical principle in an arid region—that the right is recognized only as long as, and only to the extent that, the water is put to beneficial use.[19] Since a mining claim need not be exploited to be valid, *Melluzzo* v. *Morton*, 534 F. 2d 860, 863 (C.A. 9), a mining claim to water presumably would not be lost if no beneficial use was made. Before a claim is taken to patent, the claimant need only perform $100 worth

[19] Appropriative rights are forfeited under state law by failure to use the water for a prescribed period. See Hutchins, *Selected Problems in the Law of Water Rights in the West* 392–397 (1942). They may also be lost by adverse use by another for a prescriptive period, or by intentional abandonment (*id.* at 389–392, 397–402).

of labor or make $100 worth of improvements each year to maintain his claim. 30 U.S.C. 28. If a claimant to water had met this requirement (by installing a $100 pump, for example), he presumably could prevent others from making use of the water within the boundaries of his claim, even if he did not use the water himself.

In the case of a source of water wholly within a single claim, the claimant presumably could prevent the use of this water altogether.[20] In the case of a stream flowing over his claim, it might be possible for a claimant to dam the stream and collect all the water, again without regard to his ability to make beneficial use of it.[21] Once the claim had been patented, the owner would have fee title and would not be required

[20] Although the water on Claim 22 in this case was ground water (reached by a well), the reasoning of the court of appeals would appear to apply to water generally, including surface water. This is, however, one of the questions raised and left open by the decision below.

The Executive Order of April 17, 1926, issued pursuant to Section 10 of the Stock-Raising Homestead Act of 1916, 39 Stat. 865, 43 U.S.C. 300, withdrew public lands containing springs and water holes from location under the mining laws. See 43 C.F.R. 2311.

[21] It is not clear how a federal mining right to water could be quantified or limited in amount. The mining laws permit a claimant who has located, marked, and recorded his claim to have exclusive possession and to extract an unlimited quantity of valuable minerals from a limited physical area. *Union Oil Co.* v. *Smith*, 249 U.S. 337, 348–349. The limit is 20 acres for a placer claim, 30 U.S.C. 35, and 1,500 feet along a lode claim, plus 300 feet on either side of the vein, 30 U.S.C. 23. In contrast, water rights are generally usufructuary rights, *i.e.*, rights to the use or the flow of water. Wiel, *Water Rights in the Western States* (Vol. I), §§ 15–18, Vol. II) §§ 1100–1101 (3d ed. 1911). Appropriative rights are

to expend the minimum $100 per year in order to maintain the exclusive right to "mine" the water (or to let it go unused).[22] Application of the principles of mining law, in place of those of prior appropriation, thus seems ill-calculated to assure the beneficial use of scarce water resources.

Justification for overturning the clear and long-settled legislative scheme is not provided by the perception of the court of appeals that "[s]ince early times, water has been regarded as a mineral" (Pet. App. A, p. 15a). As this Court recognized in *Northern Pacific Railway* v. *Soderberg,* 188 U.S. 526, 530:

rights to use a certain quantity of water—usually measured in cubic feet per second, or in miners' inches in the case of diversions for irrigation, or acre feet in the case of diversions for storage—during a given period of time; one may have the right to divert a given quantity continuously through the entire year, or only during a portion of the year, or at intervals. Hutchins, *Selected Problems in the Law of Water Rights in the West* 298–299 (1942). If one party has the right to appropriate vaters from a stream only on certain days of the week, those waters are subject to appropriation by others on the remaining days of the week (*ibid.*)

[22] See 30 U.S.C. 29 (lode claims) and 37 (placer claims) for the requirements for obtaining a patent.

The court of appeals did not discuss whether water was to be located as a lode or placer claim. Although this case involves a placer claim, an argument can be made that water would fall more logically within the definition of a lode claim (see *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673; *Fuller* v. *Mountain Sculpture*, 6 Utah 2d 385, 314 P. 2d 842), with a stream or groundwater basin constituting the "mineral vein" or "lode" (see 30 U.S.C. 26). In the case of a lode claim, the claimant normally has the right to follow the vein or lode, below ground level, beyond the surface limits of his claim. 30 U.S.C. 26. Thus it might be possible by a single lode claim to gain ownership of all the ground water in a basin (except in the case of land withdrawn from location under the Executive Order of April 17, 1926, see note 20, *supra*).

> The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it.

Giving the term "mineral" its broadest meaning in the context of the mining laws would be equally absurd. At the time of the enactment of the general mining laws, the General Land Office classified all public lands as either mineral or agricultural; mineral lands could be entered only under the mining laws, and agricultural lands only under the agricultural entry laws, including the Homestead and Desert Land Acts. Also at that time, Congress was making grants of nonmineral lands to the States and the railroads. See *Robert L. Beery*, 25 IBLA 287, appeal pending *sub nom. Steele* v. *Kleppe*, N.D. Cal., Civ. No. C–76–I840–WHO (Pet. App. E, pp. 59a, 66a). If all the substances within the broadcast definition of the word "mineral"—including common dirt and stone—were locatable under the mining laws, there could have been no entry under the agricultural entry laws and no grants to the States or railroads, since "all land would then have been 'mineral land.'" *Ibid.* Generalizations about the meaning of the term "mineral" in other contexts thus provide no basis for disregarding the intent that Congress has expressed in adopting the

mining laws and maintaining them for more than a century.[23]

II. CONSTRUING THE MINING LAW OF 1872 TO PERMIT LOCATION OF WATER AS A MINERAL IS ALSO CONTRARY TO THE ESTABLISHED CONSTRUCTION OF THAT ACT BY THE DEPARTMENT OF THE INTERIOR

The interpretation and application of the mining laws is the province of the Department of the Interior, which acts "as a special tribunal" to administer the laws "regulating the acquisition of rights in the public lands"; it is also the responsibility of the Secretary of the Interior, who is "charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved * * *." *Cameron* v. *United States,* 252 U.S. 450, 460; *Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334, 337. The administrative decisions of the Department of the Interior on the issue presented here were ignored by the court of appeals. Those decisions have consistently held that water is not a locatable mineral, and that the acquisition of water rights is not governed by the federal mining laws.

In early decisions nearly contemporaneous with the adoption of the mining laws, the Secretary squarely rejected the contention that water could be located as a mineral. In *William A. Chessman,* 2 L.D. 774, 775, decided in 1883, the Secretary noted that "the patent is not in fact sought for a placer claim but for a water right," and held that "as such right cannot be patented under a mining claim the application should be rejected." See also *Pagosa Springs,* 1 L.D. 562. Three years later the Secretary observed in *Charles Lennig,* 5 L.D. 190, 191, that water rights "are acquired by priority of appropriation and are governed by local customs and laws," and in that manner "are amply protected" by the 1866 and 1870 mining acts.

In 1976, after thorough consideration of the relevant provisions of the mining laws and the Desert

[23] The court of appeals relied (Pet. App. A, p. 16a) on *United States* v. *Union Oil Co.*, 549 F. 2d 1271 (C.A. 9), certiorari denied *sub nom. Ottoboni* v. *United States*, No. 76-1796, October 31, 1977, response to petition for rehearing requested, January 9, 1978, for the proposition that "water itself may be classified as a mineral." *Union Oil* holds that the reservation to the United States of "all the coal and other minerals" under Section 9 of the Stock-Raising Homestead Act of 1916, 39 Stat. 864, 43 U.S.C. 299, received geothermal resources. It provides no support for the court's construction of the mining laws here. *Union Oil* did not hold that water was a mineral, although the court did observe that each element of a geothermal system—including magma, porous rock strata, and water—might be classified as a mineral for some purposes. 549 F. 2d at 1273–1274. The court there emphasized, as we do here, that the legislative purpose controls, and that interpretation of the term "mineral" in a given statute is "basically a question of legislative intent." 549 F. 2d at 1273 n. 5. The court determined that in passing the Stock-Raising Homestead Act Congress intended to provide homesteaders with lands on which they could support their families by raising livestock, but to reserve unrelated subsurface resources, particularly energy resources, for separate disposition. The court concluded that because geothermal resources "are depletable subsurface reservoirs of energy, akin to deposits of coal and oil," They were included in this reservation. *Id.* at 1279. The court distinguished between "fresh water for the use of livestock" and "underground sources of energy for use in generating electricity." *Ibid.*

There would be, of course, nothing new about the conclusion that the meaning of a word varies in different statutory contexts. See, *e.g., Towne* v. *Eisner*, 245 U.S. 418, 425 (Holmes, J.).

Land Act, the Interior Board of Land Appeals reaffirmed this conclusion. In *Robert L. Beery,* 25 IBLA 287, appeal pending *sub nom. Steele* v. *Kleppe,* N.D. Cal., Civ. No. C–76–I840–WHO (Pet. App. E, pp. 59a–73a), the Board held (Pet. App. E, p. 70a):

> Because the usufructuary right to water was to be disposed of in accordance with *state* law, it could not at the same time be disposed of under the general mining law. Moreover, because two of the three statutory provisions severing the water from the land were enacted as *part* of the general mining law, it seems fairly clear that Congress had no intention of disposing of water under other provisions of the mining law. [Emphasis in original.]

The Board also noted that, in view of the consistent administrative precedent, it could not consider water a locatable mineral, in the absence of some compelling reason to do so, "[i]f we are to pay more than lip service to the doctrine of stare decisis * * *" (Pet. App. E, p. 63a).

Thus, even if the statutory scheme were not clear on its face, the "great deference" due to the statutory interpretations adopted by the officers charged with administering the land laws, *Udall* v. *Tallman,* 380 U.S. 1, 16; cf. *Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334, 337; *Cameron* v. *United States, supra,* 252 U.S. at 460, should preclude judicial interpretation of the statute at this date to find water to be a locatable mineral. This deference is especially appropriate where the administrative practice at stake " 'involves a contemporaneous construction of a statute by the men charged with the responsibility of

setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Udall* v. *Tallman, supra,* 380 U.S. at 16, quoting *Power Reactor Co.* v. *Electricians,* 367 U.S. 396, 408. It is well-nigh conclusive where the interpretation in question has prevailed for more than a century and has grounded a system of settled property rights.

III. PERMITTING THE LOCATION OF WATER AS A MINERAL WOULD THROW ESTABLISHED RIGHTS INTO QUESTION AND INVITE ABUSE OF THE MINING LAWS

More than 100 years after enactment of the general mining laws, the ruling below stands alone in holding that water is a locatable mineral. In reliance on the clear mandate of the relevant statutes and the decisions of both the Department of the Interior and this Court, many thousands of persons seeking water rights on public lands have followed the procedures prescribed by state and local law.[24] Affirmance of the decision below would cast doubt on rights long thought to be established under state and local law and would unsettle the law of water rights in the Western States.

The court of appeals' opinion—which does not acknowledge the existence of 30 U.S.C. 51 and 52—

[24] Indeed, although the record is silent on this point, we are informed by the Attorney General of Nevada that in 1964 respondent filed an application for a state permit to appropriate the water on Claim 22, and that a permit was granted on August 18, 1964, authorizing respondent to appropriate .5556 cubic feet of water per second.

gives no hint whether location of a mineral claim for water would be an additional method of acquiring water rights, or whether it might be deemed the exclusive method. Assuming it would only be an additional or alternative method, harmonizing the water rights acquired under the mining laws with those acquired under state law would be no simple task. Novel issues would arise, such as the priority of rights acquired under the different systems, that could be expected to generate extensive litigation.[25] If location under the mining laws were now deemed the exclusive method for acquiring water rights (despite 30 U.S.C. 51 and 52), private rights long considered established under state law would presumably be invalidated.

Permitting the location and patent of mining claims for water would also invite abuse of the mining laws by persons seeking to obtain land for purposes other than mining. Under Section 203 of the Federal Land Policy and Management Act of 1976, Pub. L. 94–579, 90 Stat. 2750, a person who purchases public land for a residential subdivision must pay its fair market value. Under the law now applicable to the disposal of common variety minerals and timber on the public lands, the purchaser must pay "adequate compensa-

[25] For example, since mining claims are permitted in the national forests (see 16 U.S.C. 482 *et seq.*), conflicts might arise between mining claims located for water on forest lands and rights impliedly reserved by the United States, at the time of the reservation of those lands, to sufficient water "to accomplish the purpose of the reservation." See *Cappaert* v. *United States*, 426 U.S. 128, 138.

tion" as established by competitive bidding. 30 U.S.C. 601, 602. Under the mining laws, in contrast, if a valuable mineral is present and the claimant has spent at least $500 improving his claim, he can obtain fee title to a 20-acre placer claim for $2.50 per acre (30 U.S.C. 37) and fee title to a lode claim for $5.00 per acre (30 U.S.C. 29). Because of the relative ease with which mining claims may be located and perfected, the ability to locate and patent claims to "minerals" of widespread occurrence has previously led to misuse of the mining laws by persons seeking land for other purposes. It was misuse of sand and gravel claims that led Congress in 1955 to remove sand, gravel, and other specified materials of widespread occurrence from location under the mining laws (Act of July 23, 1955, 69 Stat. 368–372, as amended, 30 U.S.C. 611–615). See H.R. Rep. No. 84–730, 84th Cong., 1st Sess. 5–6 (1955).[26]

The Department of the Interior has concluded that because of the widespread occurrence of water, to allow the location of mining claims to this "mineral"

[26] Section 4 of that Act, 69 Stat. 368, as amended, 30 U.S.C. 612, reaffirmed the congressional understanding that water is not a mineral under the mining laws. Section 4 provides that nothing in the Act "shall be construed as affecting or intended to affect or in any way interfere with or modify the laws * * * [of the Western States] relating to ownership, control, approrpriation, use, and distribution of ground or surface waters within any unpatented mining claim."

The conference report states that this language was an amendment "[a]greed to by the House managers, * * * [which] makes clear an intent to leave unaffected the operation of State water laws in the reclamation West governing the ownership, control, appropriation, use, and distribution of ground or surface waters." H.R. Conf. Rep. No. 84–1096. 84th Cong., 1st Sess. 3 (1955).

would "invit[e] a repeat of the abuses attending the locatability of sand and gravel * * *." *Robert L. Beery, supra* (Pet. App. E, p. 68a). The potential for abuse in the case of water is formidable. Although no precise figures are available regarding the amount of public land open for location on which water might be discovered, it is estimated that approximately 309.9 million acres are now available for location under the mining laws,[27] and that one-third of the area of the coterminous United States overlies groundwater from which a well could produce at least 50 gallons of water per minute.[28] Although we do not know whether the one-third fraction applicable to the country as a whole is also applicable to the locatable portion, it is clear that mining claims based on water as a locatable mineral could permit the private acquisition of millions of acres of federal land, without the commensu-

[27] A 1976 study by the Secretary of the Interior reported that in the States subject to the mining law of 1872, public domain lands and lands in which a mineral estate had been reserved to the United States totaled 734 million acres, or approximately 33 percent of the total land area of the United States. Annual Report of the Secretary of the Interior under the Mining and Minerals Policy Act of 1970, *Mining and Minerals Policy* 83 (1976). Of this total, 233.6 million acres are currently subject to slight or no restrictions on mineral exploration and development under the mining law, and another 76.3 million acres are available for such development subject to moderate restrictions. *Id.* at 84–87 and Table 6–1. The remaining 424 million acres include lands on which mineral exploration and development have been formally prohibited by an Act of Congress, Executive Order, or some other dictate, and lands where mineral development is severely restricted. *Id.* at 85.

[28] Corker, *Groundwater Law, Management, and Administration* 4 (1971).

rate public gain that presumably results from the exploitation of substances traditionally classed as minerals. The potential for abuse is especially troubling in view of the court of appeals' reliance on the intrinsic value of water in a desert community to establish marketability (Pet. App. A, p. 17a), an analysis that seems to justify any mining claim to water throughout the arid West. The widespread existence of water under public lands might prompt claimants to attempt the blanket location of much of the West (in a manner such as that described in *United States* v. *Zweifel,* 508 F. 2d 1150 (C.A. 10)), with the knowledge that the United States would have difficulty challenging these claims in order to clear the lands for legitimate mineral exploitation.

Indeed, since mining claims need not specify the mineral discovered, allowing the location of claims for water might permit the validation of otherwise invalid claims originally premised on the discovery of some other mineral. For instance, prior to the court of appeals' decision respondent had claimed Claim 22 in this case was located for sand and gravel, not water. The Department of the Interior believes that such metamorphoses of mining claims could become common in areas such as the Las Vegas Valley, where many sand and gravel claims that the Department has contested overlie potential groundwater supplies. Thus, permitting the location of claims for water might not only encourage new attempts to misuse the mining laws, but might also validate claims of the very sort that caused Congress to withdraw sand

and gravel from location in order to stop a demonstrated pattern of abuse of those laws.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it holds Claim 22 valid.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1977

No. 77-380

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner

v.

CHARLESTONE STONE PRODUCTS CO., INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENT

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IN THE

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---

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-17a) is reported at 553 F. 2d 1209 (9th Cir. 1977). The opinion of the district court (Pet. App. C, pp. 19a-27a) is not reported. The decision of the Interior Board of Land Appeals (Pet. App. D, pp. 28a-58a) is reported at 9 IBLA 94 (1973).

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 18a) was entered on May 12, 1977. On August 1, 1977, Mr. Justice Rehnquist extended the time for filing a petition for writ of certiorari to and including September 9, 1977, and the petition was filed on that date. The petition was granted on November 28, 1977 (A. 36A). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether water is a locatable mineral under the mining law of 1872.

STATUTES INVOLVED

Section 1 of the Act of May 10, 1872, ch. 152, 17 Stat. 91, (current version at 30 U.S.C. § 22 (1970)) provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 17 of the Act of July 9, 1870, ch. 235, 16 Stat. 218, (current version at 30 U.S.C. § 52 (1970)) provides:

> All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title.

Section 9 of the Act of July 26, 1866, ch. 262, 14 Stat. 253, (current version at 30 U.S.C. § 51 (1970)) provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *

STATEMENT

Respondent does not fully agree with petitioner's Statement. As the differences relate solely to evidentiary matters which are not germane to the single issue of law presented, we will not burden the Court with a further statement.

SUMMARY OF ARGUMENT

1. The mining law of 1872 nowhere expressly provides that the term "mineral" should not include water. The plain language of the two water provisions in the mining law (§ 9 of the 1866 Act and § 17 of the 1870 Act) speaks only of recognizing water rights which have "vested and accrued" under state law. Petitioner infers from this language that Congress intended that in the future state water law would be the *exclusive* method of recognizing water rights. A construction more consonant with the statutory language is that although Congress desired to protect all

water rights, past or future, which have at some point vested under state law, it did not extend exclusive control of water rights to the states. Treating water as a locatable mineral under the mining law of 1872 would not make the water provisions surplusage. Those provisions continue to protect all water rights which have previously vested, *and* which in the future may vest under state law. The federal mining law could *only* be used to obtain rights to waters *not yet appropriated* under state law.

Recognition of water rights vested under state law is not inconsistent with the recognition of additional methods of acquiring water rights. Section 1 of the mining law of 1872, the section at issue in the present case, provides in broad and inclusive terms that *"all* valuable mineral deposits" may be located and mined. In all of the specific exceptions to this broad terminology, neither Congress nor this Court has ever removed water from the operation of the mining law. The court of appeals utilized petitioner's own test published in the Code of Federal Regulations and cited authorities for the proposition that water comes within the definition of the term "mineral." The court of appeals also used tests recognized by this Court to determine that water is a "valuable mineral" within the mining law.

2. The primary authority for petitioner's construction of the water provisions in the mining law is *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935). That case was not concerned with the mining laws. The Court was there ruling on conflicting claims based on the Homestead Act of 1862 and the Oregon Water Code and the Court specifically stated that its holding was based solely on its construction of a provision of the Desert

Land Act of 1877. Language in *Beaver Portland Cement* discussing the vested water rights provisions of the mining law is dicta. Even assuming that such language may be considered applicable to the single issue before this Court—the locatability of water under the mining law of 1872—it is completely consistent with respondent's position. Respondent concedes that water rights may continue to be appropriated for beneficial use under state law, and if so appropriated prior to location under the mining law of 1872 they are protected as vested and accrued rights under Section 9 of the 1866 Act and Section 17 of the 1870 Act. Only water to which rights have not vested under state law may be located as a mineral under the mining law of 1872.

3. Petitioner argues that other public land laws "followed the pattern" of the mining law in recognizing that state law exclusively controls the acquisition of water rights. This Court has not construed water provisions in other federal laws so broadly. For example, water provisions of the Federal Power Act and the Reclamation Act have been construed by this Court to limit state control of water rights in favor of federal control. This is more consistent with parallel state and federal water rights acquisition programs than petitioner's portrayal of a regime of exclusive state control of water rights. Petitioner supports and enforces the reservation doctrine which holds that when the United States Government reserves lands for a particular purpose it also impliedly reserves enough water to effectuate that purpose. Under that doctrine if a private citizen appropriates water from a source shared by the reservation subsequent to creation of the reservation, even if those appropriative

rights "vest" under state law, they may subsequently be held inferior to the needs of the reservation. Thus unquantified federally reserved water rights are forever superior to the rights of later appropriators whose water rights are quantified and "established" under state law. This is inimical to petitioner's contention that state law exclusively controls the acquisition of water rights.

4. The "long-standing" Department of Interior interpretation that water is not a locatable mineral under the mining law is not conclusive before this Court. Subsequent Interior decisions holding water not locatable under the mining law rely heavily on the earliest decisions consisting of a few conclusory sentences which neither cite authority nor discuss rationale. Even "more than a century of administrative decisions" cannot by mere weight of number or longevity develop a statutory interpretation immune to a fresh look and a more logical interpretation by this Court.

5. Petitioner argues that allowing the location of water as a mineral under the mining law will result in widespread abuse. This is mere conjecture, and ignores the safeguards built into the mining laws such as the "prudent man" test and the "marketability" test, which are designed to prevent abuse with respect to *all* minerals. Moreover, if the law as written is being abused, it is the responsibility of Congress to amend that law, as it has done in the past by removing certain minerals from the operation of the mining law.

ARGUMENT

I. THE BROAD LANGUAGE OF SECTION 1 OF THE MINING ACT OF 1872 INCLUDES WATER AS A LOCATABLE MINERAL.

Petitioner concedes, as he must, that "Congress nowhere expressly provided that the term 'mineral' in the mining law of 1872 should not be construed to include water" (Pet. Br., p. 23). Nevertheless petitioner divines a "clear" Congressional intention to exclude water from location under the 1872 Act because, he contends, Congress provided "in that statute for the *acquisition* of water rights under state law (by reaffirming Section 9 of the 1866 Act and Section 17 of the 1870 Act . . .)" *Id.* (Emphasis supplied). But the plain language of *both* Section 9 of the 1866 Act, 30 U.S.C. § 51 (1970), and Section 17 of the 1870 Act, 30 U.S.C. § 52 (1970), makes clear that it was the *recognition* of rights to the *use* of water which "*have vested* and accrued" that Congress articulated and *not* the *future* "acquisition of water rights under state law." For Section 9 of the 1866 Act speaks only of water rights which "have vested and accrued" and provides that "the possessors and owners of such vested rights shall be maintained and protected," and Section 17 of the 1870 Act speaks only of "vested and accrued water rights" or ditches and reservoirs used in connection "with such water rights as may have been acquired under or recognized by [Section 9 of the 1866 Act]."

Petitioner argues further that the court of appeals decision renders Sections 9 and 17 of the 1866 and 1870 Acts, respectively, "superfluous" and therefore "offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect" (Pet. Br., p. 24) (citations omitted). This criticism is both unduly harsh and misdirected. The

court of appeals decision does indeed permit "all parts" of the mining law provisions "to be given effect." It permits *all* valuable minerals not specifically excepted to be located and it gives effect to Congress' explicit recognition of those rights to use water which were *vested* at the passage of the 1866 and 1870 Acts in accordance with state laws. It is petitioner who insists on ignoring the rule of statutory construction he invokes because he would attribute no meaning whatsoever to the critical language in *both* Sections 9 and 17—that the water rights described are those which *"have vested"* and *"have been acquired"* pursuant to state laws.[1]

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[1] A lucid explanation of the reasons for congressional concern that vested rights be protected upon passage of the mining laws is contained in *Broder* v. *Natoma Water & Mining Co.*, 101 U.S. 274 (1879), where this Court said:

> We are of the opinion that it is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct recognized and encouraged and was bound to protect before passage of the Act of 1866, and that the section of the Act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.

Id. at 276. Dean Trelease, a noted contemporary authority on water law, also reads the water provisions in the mining law as merely a recognition of vested rights:

> Only in the negative sense that the United States promised to protect the water rights from claims of future patentees can this be said to be a water law. The criticism of the language as "unhappy" is justified only when it is sought to find something else in the act—a confirmation of state title to federal water, or permission for the states to dispose of federal water. Language for these provisions is not there and the existing language has to be stretched. But if the statute is read for what it was, it is very plain and clear.

F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW, National Water Commission Legal Study No. 5, p. 147c (1971) (hereinafter "TRELEASE").

It is also worth noting that nowhere in the legislative history of the mining laws is there any discussion which indicates that Congress intended anything so fundamental as to relinquish to the states the right to control water.

A close reading of the statutory language using "mineral" does not allow even an inference that Congress intended that term to exclude water.

The mining law of 1872, Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C.), declares:

> Except as otherwise provided, *all valuable mineral deposits* in lands belonging to the United States . . . shall be free and open to exploration and purchase. and the lands on which they are found to occupation and purchase . . . ."

30 U.S.C. § 22 (1970) (emphasis supplied). This language is exceedingly broad and inclusive. It has been limited by three explicit exceptions, none of which excludes water as a locatable mineral.

The first limitation on the broad scope of mineral location under the mining law of 1872 is this Court's decision that the law applies only to mineral deposits in the "public domain" and not to other federal lands reserved for other purposes. *Oklahoma* v. *Texas,* 258 U.S. 574 (1922). This limitation has no relevance to the question whether water is a locatable mineral under the mining law.

A further limitation is that subsequent legislation has removed certain kinds of minerals, mineral deposits and the land containing them from the operation of the general mining law. For example, coal, oil, gas, oil shale, sodium phosphate and potash are excepted from the operation of the mining law and permission to extract them is acquired under a number of mineral leasing laws. 30 U.S.C. §§ 181-194, 201-209, 211-214, 223-229a, 241, 251 and 261-263 (1970). Sand, gravel and other specified common minerals once locatable under the mining law of 1872 were specifically withdrawn from location by Congress in 1955. Act of July 23, 1955, ch. 375, 69 Stat. 367 (codified at 30 U.S.C. §§ 601, 602, 611--615 (1970)). Congress has never acted to remove water from location as a mineral under the mining law.

The only limitation on the scope of the mining law relevant to this case lies in the definition of the phrase "valuable mineral deposits" used in section 1 of the 1872 law itself. The accepted test for determining whether public lands contain a "*valuable* mineral deposit" justifying location under the mining law is the "prudent man test." In *Cameron* v. *United States,* 252 U.S. 450 (1970), this Court set forth the test in these words: "To support a mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine." *Id.* at 459. *See also Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334 (1963); *Chrisman* v. *Miller,* 197 U.S. 313 (1905); *Castle* v. *Womble,* 19 L.D. 455 (1894). In conjunction with the "prudent man" test, the "marketability" test was developed, as described by the Court in *United States* v. *Coleman,* 390 U.S. 599 (1968):

> . . . the marketability test is an admirable effort to identify with greater precision and objectivity

> the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent-man test" which the Secretary has been using to interpret the mining laws since 1894.

Id. at 602.

If the prudent man and marketability tests are applied to the water resources at issue in the present case, then the lands unquestionably contain a "*valuable* mineral deposit." As the court of appeals found:

> . . . the only relevant evidence in the record demonstrates the existence of a profitable market of water as a washing agent for the sand and gravel recovered from the valid claims. Although unwashed sand and gravel has a limited market, good quality sand and gravel in combination with water draws a premium market.
>
> We are satisfied that Charlestone has shown a profitable market for the water recovered upon claim 22 and its claim for the extraction of that water is valid.

(Pet. App. A., p. 17a).

There remains only the question whether water is a "mineral" deposit. Judicial authority on the subject is sparse. At least one federal court has looked to the standard developed by Lindley, one of the pre-eminent mining authorities, for guidance in determining whether a particular substance satisfies the definition of "valuable mineral deposit" locatable under the mining law of 1872:

> "The mineral character of the land is established when it is shown to have upon it or within it such a substance as: (a) Is recognized as a mineral, according to its chemical composition, by

> the standard authorities on the subject, or (b) Is classified as a mineral product in trade or commerce, or [sic] (c) Such a substance (other than mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, * * * and it is demonstrated * * * that such substance exists in the lands in such quantity as would justify a prudent man in expending labor and capital in the effort to obtain it." 1 Lindley Mines, 3rd ed. 1914. 174-175, § 98, as restated in 1 Amer. Law of Mining 172 § 2.4.

United States v. *Toole,* 224 F.Supp. 440, 445 (D. Mont. 1963). Although part (c) of this definition merely restates the prudent man test, part (a) is the test of "minerality" and looks to "standard authorities" on the subject.

Another source for a definition of the word "mineral" as used in the mining law is the petitioner's own regulations, which provide in relevant part:

> Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the Mining Laws . . . .

Minerals Subject to Location, 43 C.F.R. § 3812.1 (1976). This definition also looks to "standard authorities" to determine whether water falls within the definition of the term "mineral" as used in the mining law.

Petitioner has ignored his own test to define the term "mineral" and has produced no standard authorities other than his own decisions to support his contention that water is not a "mineral." The court of appeals

did supply its version of standard authorities. It cited a mining law section of a recognized legal encyclopedia, 58 C.J.S. *Mines & Minerals* § 2(7) (1948), and a recent court of appeals decision, *United States* v. *Union Oil Co.,* 549 F.2d 1271 (9th Cir.), *cert. denied sub nom. Ottoboni* v. *United States,* 98 S.Ct. 418 (1977), *motion for leave to file petition for rehearing denied,* 46 U.S. L.W. 3542 (U.S. Feb. 28, 1978) (Pet. App. A, p. 16a).

The *Union Oil* decision is persuasive support for the decision below that water is a mineral. The question in that case was whether the mineral reservation in patents issued under the Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 291-301 (1970), reserved to the United States geothermal resources under the patented lands. That act contains a provision that all patents are "subject to and contain a *reservation* to the United States of all the coal and *other minerals* in the lands so entered and patented, *together with the right to prospect for, mine, and remove the same.*" 43 U.S.C. § 299 (1970) (emphasis supplied). The statutory language leaves no doubt that Congress reserved those minerals for mining under other appropriate federal acts—the general mining laws. The Ninth Circuit held in *Union Oil, supra,* that the clause reserving "all the coal and other minerals" included geothermal resources which include water. In its discussion the court stated, "[a]ll of the elements of a geothermal system—magma, porous rock strata, *even water itself*—may be classified as 'minerals.'" 549 F.2d at 1273-1274 (emphasis supplied). The reservation included clear language that the right to *mine* embraces all reserved minerals. That language necessarily applies to water. The court below correctly found this to be convincing authority for the proposition that water is a mineral under the mining law.

II. NEITHER THE MINING ACTS OF 1866 AND 1870, NOR THE DESERT LAND ACT OF 1877 RELINQUISHED CONTROL OF FEDERALLY OWNED WATERS BY VIRTUE OF RECOGNIZING VESTED RIGHTS UNDER STATE LAW.

The mining laws of 1866, Act of July 26, 1866, ch. 262, 14 Stat. 251, and 1870, Act of July 9, 1870, ch. 235, 16 Stat. 217, sanctioned and validated *vested* water rights recognized by local law and custom. These laws also guaranteed that appropriative rights acquired before 1866 would not be defeated by claims of federal mining patentees. But neither Act extended to a blanket disposition of the right to control federally owned non-navigable water to the states, as petitioner would have the Court believe. Nor did the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (current version at 43 U.S.C. §§ 321-323, 325, 327-329 (1970)), convey title to these waters to the states. Since none of the above Acts specifically disposed of any federally owned waters, the most that can be attributed to them is that the United States agreed to *share,* not totally relinquish, control over non-navigable waters.

The critical premise of petitioner's argument is that the water provisions in the mining laws were not just a recognition of previously vested rights but a grant of authority to the states. The primary authority upon which petitioner relies in support of his thesis is *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142 (1935) (Pet. Br., pp. 17, 22). That case did not involve any claims to either land or water under the mining law. Neither the federal government nor any state participated in the litigation. The controversy involved only a dispute between private parties over use of water of a non-navigable stream which formed the boundary between the parties' lands. One of the landowners, the successor in interest to a patent issued pursuant to the Homestead Act of 1862, claimed the patent carried with it the common law right to continuous flow of the stream without substantial diminution. The other owner contended that the Oregon Water Code, which enacted the appropriation doctrine, governed the dispute. The Oregon Water Code had been adopted after acquisition of the homestead patent, but before the patentee's appropriation of the stream's water to beneficial use. The lower court held in favor of the party claiming appropriative rights under the Oregon Water Code. The Supreme Court affirmed, but—to borrow a phrase from petitioner's description of the court of appeals' affirmance in this case—with "significant addition[s]" (Pet. Br., p. 9).

The precise question before the Court was whether "the homestead patent in question carried with it as part of the granted estate the common law rights which attach to riparian proprietorship." 295 U.S. at 154. As noted, the "homestead patent in question" derived from the Homestead Act of 1862. To answer the specific question raised, the Court's opinion ranged broadly, offering its views of the effect of Section 9 of the mining law of 1866, of Section 17 of the 1870 amendments to the 1866 Act and, finally, construing the Desert Land Act of 1877, upon which it based its decision.

Petitioner asserts that this Court "held" in *Beaver Portland Cement* that the provisions of Section 9 of the 1866 and Section 17 of the 1870 mining laws apply prospectively, and argues that the case supports his position that the general mining law provides for

the acquisition of water rights exclusively by state and local law. Petitioner sets forth the following quotation from the Court's discussion:

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain. 295 U.S. at 155.

(Pet. Br., p. 17).

That language is dictum—not a holding of the Court, as petitioner represents. Neither party in *Beaver Portland Cement* was making any claim to water rights on the basis of either Section 9 of the 1866 or Section 17 of the 1870 mining laws. Petitioner based its claim on the Homestead Act of 1862 and respondent based its claim on the Oregon Water Code of 1909. 295 U.S. at 151-153. Therefore, the Court's statement concerning "the effect of" the mining law provisions and the assertion that "[t]hey reach into the future" is not a holding, it is merely an observation.

Moreover, to the extent that the *Beaver Portland Cement* Court's statement may be regarded as appliable to the issue before this Court, it is perfectly consistent with respondent's position. It should be clearly understood that respondent does *not* contend that *only* those water rights appropriated for beneficial use under state law prior to 1866 or 1870 are "maintained and protected" under Section 9 or "recognized" under Section 17. On the contrary, we concede that under

both sections rights to appropriate beneficial use of water under state law may *vest*—and therefore be "protected" and "recognized"—at *any* time prior to such water being located as a mineral under the mining law of 1872. Petitioner, on the other hand, seeks to avoid the plain import of the harmonious reading of Section 9 of the 1866 Act, Section 17 of the 1870 Act and Section 1 of the 1872 Act by reading far more into the quoted *Beaver Portland Cement* language than is there—a recognition that water rights obtained under state appropriation laws *after* 1866 were nonetheless to be "recognized" and "protected."

Indeed, if as petitioner contends, the quoted *Beaver Portland Cement* language constitutes a "holding" that "when Congress enacted the general mining laws it chose to sanction the rights acquired under state and local law" (Pet.Br., p. 17), there would have been no need for the Court to analyze and interpret the provisions of the Desert Land Act of 1877. Since the successful respondent in *Beaver Portland Cement* was claiming superior water rights pursuant to state law, if the quoted language relied upon by petitioner were adequate to "sanction" that claim, the provisions of the Desert Land Act upon which the Court based its decision would have been irrelevant and unnecessary to the Court's decision.

Petitioner's reliance on *Beaver Portland Cement* does not end with that Court's dictum concerning the vested water rights provisions of the mining laws. To support his argument that "other public land laws followed the pattern established in the general mining laws, recognizing that state law governs the acquisition of private water rights on public lands"

(Pet. Br., p. 20) (footnote omitted) petitioner relies *exclusively* upon *Beaver Portland Cement*. Thus, petitioner extensively quotes the Court's construction of the Desert Land Act of 1877, and describes it as "[p]erhaps the most pertinent" of the "other public land laws" said to follow the "pattern" petitioner perceives in the general mining laws governing the acquisition of private water rights (Pet. Br., pp. 21, 22). But not even petitioner argues that *Beaver Portland Cement's* construction of the Desert Land Act embraced the general mining laws, much less Section 1 of the mining law of 1872, which is the statute at issue in *this* case and which is nowhere mentioned in the Court's expansive opinion.

Nor could such an argument, if advanced, withstand analysis. The Court was ruling upon conflicting claims to water, one pursuant to the Homestead Act of 1862, the other under a state water code enacted after issuance of the homestead patent, but before appropriation of any water from a non-navigable stream which formed one of the boundaries to the patented land. In those circumstances, there was no need for the Court to construe the mining laws generally, much less the specific provision of the 1872 mining law that is at issue here. Indeed, one wonders whether the Court's expansive construction of section 1 of the Desert Land Act was warranted since the rather explicit language in that section, including its water provision, nowhere mentions previously enacted preemption and homestead laws.[9] But at least the Court's

[9] The water provision provides:

> . . . provided, however, that the right to the use of water by the person so conducting the same on or to any tract of desert land of 640 acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights."

43 U.S.C. § 321 (1970).

A careful reading of this provision shows its purpose was to limit the settlers' appropriation of water—not to grant power to the states. In analyzing this provision Trelease concluded:

> In context the proviso is a single proviso, a limitation on the settler. *He* had to appropriate, *He* could take only necessary water, and the rest of the water was reserved from him. It was a simple anti-monopoly provision. It deals with water law only in a most restricted sense, only in requiring the settler to acquire his water by appropriation and in preventing him from claiming more than he needs, even if the state law would allow him to do so. The legislative history bears this out.

TRELEASE at 147. The legislative history does indeed support this view. Debate in the Senate focused on the need for the bill because of the inadequacy of the homestead laws when irrigation was necessary. One Senator, fearing that under the act settlers could capture so much water as "to cut off others from tapping the lakes or tapping the streams and rivers," offered an amendment limiting the amount a settler could appropriate to the amount actually necessary for irrigation. 5 CONG. REC. 1964 (1877). This amendment, as refined by the conference committee, became the present water provision. It is reasonable to assume that the final proviso was merely a rewording and clarification of the Senator's thoughts and was meant to accomplish the same goal as the original amendment, and no more.

broad construction of the Desert Land Act can be explained by its desire to affirm the decree of the court below while "passing without consideration the second question discussed by that court upon which its decision rested, as to which we express no opinion." 295 U.S. at 165. That "second question" was whether, as

the court below had held, federal homestead patent water rights were "subject to the police power of the state and might be modified by legislation passed in the interest of the general welfare." 295 U.S. at 153. Had the *Beaver Portland Cement* Court accepted the narrower construction of the Desert Land Act—and thereby limited its application to desert land entries, as the Supreme Courts of California and Washington had done—the Court would have been forced to resolve whether states could regulate federal grants since the patentee was not claiming water rights pursuant to a Desert Land Act entry. The broad construction adopted by the Court permitted it to say, in language which precedes that quoted at length by petitioner (Pet. Br., p. 22):

> Congress must have known that innumerable instances would arise where lands thereafter patented under the Desert Land Act and other lands patented under the *pre-emption and homestead laws,* would be in the same locality and would require water from the same natural sources of supply. In that view, it is inconceivable that Congress intended to abrogate the common-law right of the riparian patentee for the benefit of the desert land owner and keep it alive against the *homestead or pre-emption claimant.*

295 U.S. at 161-162 (emphasis supplied).

Since the Court faced no such problem concerning *mining law* entries, claims and patents, it is not at all surprising that it was careful to expand the reach of the Desert Land Act only so far as to encompass homestead and pre-emption claimants and not mining law claimants.

Even assuming *arguendo* that the water law provisions in the mining law are read prospectively, this

does not mean they are exclusive. If petitioner's authority supporting a prospective reading of those water provisions is questionable, his support for the proposition that those provisions give the states *exclusive* control of water rights is non-existent. Petitioner's argument assumes that if the federal government chooses to recognize water claims vested under state law, even in the future, then the states have received an *exclusive* mandate to control water rights. That assumption is illogical and nowhere to be found either in statutory language or in case authority. Water rights may be acquired under either federal mining law or state law and a claim perfected under either must be respected and recognized by future claimants under both systems.

III. ACTIONS BY THE UNITED STATES GOVERNMENT AND DECISIONS OF THIS COURT HAVE LIMITED THE STATES' CONTROL OF WATER WHICH PETITIONER CLAIMS IS ABSOLUTE.

As the United States expanded westward and southward from the original thirteen states, the federal government became the owner of vast areas of land. In the states carved out of these lands, "[a]s the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately." *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142, 162 (1935). Congress has inserted water provisions similar to those in the 1866 and 1870 mining acts in a number of statutes affecting land or water rights.[8]

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[8] One commentator identified the source of these provisions:

> Again and again the western states' delegations to Congress secured the insertion in laws for federal programs and projects

Petitioner asserts that these statutes are not only public land laws, such as the Desert Land Act, but include, "in addition many Acts dealing with federal programs and projects which include provisions disclaiming any intent to affect or or interfere with state laws relating to the control, appropriation, use or distribution of water, or with vested rights acquired under those laws" (Pet. Br., p. 20, n. 15). And petitioner identifies, *inter alia,* the Federal Power Act and the Reclamation Act as two statutes where "[p]rovisions of this nature are found." *Id.*

Understandably, petitioner does not argue that either the federal government or this Court interprets these federal laws in the fashion he urges this Court to construe the vested water rights provisions of the mining laws. For this Court's construction of the water provisions of Section 9(b) of the Federal Power Act,[4] 16 U.S.C. § 802(b) (1970), and Section 8 of the

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of a disclaimer that: "nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water, or any vested right acquired thereunder."

TRELEASE at 79.

The following is a sample of water provisions found in federal statutes which contain similar language to that quoted above: the Mining Act of 1866, § 9, 30 U.S.C. § 51 (1970), and 1870, § 17, 30 U.S.C. § 52 (1970); the Desert Land Act of 1872, § 1, 43 U.S.C. § 321 (1970); the Taylor Grazing Act, § 3, 43 U.S.C. § 315b (1970); The Reclamation Act of 1902, § 8, 43 U.S.C. §§ 372, 383 (1970); Federal Power Act of 1920, § 9(b), 16 U.S.C. § 802 (b) (1970); the Boulder Canyon Project Acts, 43 U.S.C., §§ 617q, 618m (1970).

[4] Section 9 provides in relevant part:

Each applicant for a license under this chapter shall submit to the commission—

Reclamation Act,[5] 43 U.S.C. §§ 372, 383 (1970) for example, is at war with the interpretation petitioner insists upon for similar provisions in the mining law.[6]

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

16 U.S.C. § 802(b) (1970).

[5] Section 8:

"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Reclamation Act of 1902, § 8, ch. 1093, 320 Stat. 388 (codified at 43 U.S.C. §§ 372, 383 (1970).

[6] Petitioner cited in a footnote the following statutory language as his example of a typical water provision in a federal statute:

The National Forest Act provides (30 Stat. 36, 16 U.S.C. 481): "All waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations thereunder."

(Pet. Br., p. 21, n.16). Ironically this proviso on its face calls for both state and federal control of the use rights of that water on the public domain—which is precisely what petitioner claims is impossible under the water provisions in the mining law.

Both are standard provisions which under petitioner's argument do not permit the Acts of which they are a part to interfere with state law regarding control of water. Both received short shrift from the federal government and from this Court.

In *First Iowa Hydro-Elec. Cooperative* v. *Federal Power Commission,* 328 U.S. 152 (1946), the question was whether a diversion from a navigable stream could be licensed by the Federal Power Commission without a state permit. The resolution of that question turned on Section 9(b) of the Federal Power Act. The Court found that state water law was inconsistent with provisions of the Federal Power Act, and held that Section 9(b) was not intended to permit duplication of regulatory control. The federal statute was held to be paramount, and to supersede state law. The Court's construction of Section 9(b) was that the applicant need only submit evidence that he took steps to secure state approval. The decision in *First Iowa* makes untenable petitioner's argument that the states have been given exclusive control of water rights. That decision is consistent with respondent's argument—that the federal government has control of water rights and has also chosen to recognize rights vested under state law. Recognition of water rights vested under state law is not inconsistent with the recognition of additional methods of acquiring water rights under the federal mining laws.

"State control" of water under Section 8 of the Reclamation Act met the same fate as it did under Section 9(b) of the Federal Power Act through a series of three decisions by this Court. *Ivanhoe Irrigation Dist.* v. *McCracken,* 357 U.S. 275 (1958), upheld a Reclamation Act provision which limited the amount

of water that could be appropriated for use by one landowner. The California Supreme Court had held that Section 8 required the application of state water law. This Court reversed. Although the Court disavowed that it was "passing generally on the coverage of Section 8 in the delicate area of federal-state relations in the irrigation field," *Id.* at 292, it nonetheless held that federal rather than state water law controlled the limits of water appropriation.

In *Fresno* v. *California,* 372 U.S. 627 (1963), the city sought an injunction and declaration that its water rights were superior to a federal reclamation project, or that it was entitled to participation in the project by reason of state laws giving it preference to the use of water for municipal purposes. Although the Court held that the United States and the reclamation officials were immune from suit, it stated that, "[s]ection 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others . . . [r]ather, the effect of Section 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." 372 U.S. at 630. In a companion case, *Dugan* v. *Rank,* 372 U.S. 609 (1963), holders of water rights whose water was captured by the federal dam project were left with only a suit for damages as relief. These cases appear to attribute to Section 8 little more than the proposition that the United States will pay if the Secretary takes a citizen's water.

Only one construction of the so-called water provisions can be read consistently in every federal statute and yet do no violence to any statute: those provisions were intended only to protect water rights which had

vested under state law prior to statutorily sanctioned behavior which otherwise could threaten those water rights. Thus federal laws such as the mining law could dispose of water as long as each disposition in no way affected *vested* state water rights. The petitioner's argument that the single water provision in each of the two mining acts and the Desert Land Act somehow constitute a "federal water act" designed to legitimate the states' exclusive future control of water rights is more freight than the individual provisions can carry.

The extent of federal power to regulate water is seen in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955). This case again involved a conflict between the FPC and state licensing authorities, but differed from *First Iowa, supra*, in that the stream was non-navigable and the dam was to be built on federally reserved lands. The Court found that the FPC had jurisdiction over the project not, as in *First Iowa*, because navigable waters of the United States were involved, but because of "the ownership or control of the United States of the reserved lands on which the licensed project is to be located." 349 U.S. at 442. The license issued by the FPC had expressly subjected the project to all "existing rights to the use of the water of the river, whether perfected or not." 349 U.S. at 441. But when the State of Oregon objected, this Court upheld the Commission. By finding the constitutional authority of Congress in that case to lie in the property clause, the Court's rationale can only have been that the United States owns *some* property, *viz.*, unappropriated non-navigable waters, which it can therefore regulate free of state control. This conflicts with petitioner's reading of the water provisions of the mining law which petitioner claims give the states absolute control.

Undoubtedly the most significant limitation on states claiming title or even affecting control of waters is the "reservation doctrine." The doctrine originated in *Winters* v. *United States*, 207 U.S. 564 (1908) which held that the setting aside of an Indian reservation also necessarily reserved enough water to accomplish the purpose of the reservation. In *Winters*, private appropriative rights to the non-navigable Milk River were acquired and vested under state law subsequent to the date of the federal reservation. The Court held that those private rights were inferior to a later necessary water use by the reservation.

The reservation doctrine was expanded far beyond its original scope by *Arizona* v. *California*, 373 U.S. 546 (1963). Although *Winters* had focused upon the Indians' need for water, the Court in *Arizona* concluded that the principle underlying the reservation of water rights for Indian lands is equally applicable to other federal establishments. The Court found that the federal government impliedly reserves water everytime it creates a federal enclave. Thus the reservation doctrine also applies to national recreation areas, wildlife refuges and national forests. 373 U.S. at 601.

This Court's most recent expansion of the reservation doctrine came in *Cappaert* v. *United States*, 426 U.S. 128 (1976), which extended it to percolating water. The pumping of a private water user adjacent to a federal reservation was lowering the water level on the reservation and threatening the endangered species of fish for which the reservation had been made. The water rights of the private user had apparently been perfected under state law after the federal reservation had been created. Since the federal reservation was prior in time to the citizen's appropriation, the

Court held that the citizen's rights had not vested and were therefore inferior to the reserved needs of the federal reservation.

The most significant impact of the reservation doctrine is that anyone in or around federal reservations who appropriates water subsequent to the establishment of the reservation can never be certain that his rights—even if perfected under state law—are inviolate. If, in the future, any appropriation adversely affects the amount of water necessary for the purpose of the reservation, a court seeking to satisfy the needs of the reservation could declare the rights of the private appropriator never to have vested. The system of rights that petitioner has himself supported and enforced elsewhere is inimical to the interpretation of the water provisions of the mining law he urges here. Petitioner here insists that Congress has turned over to the states the sole authority to control the acquisition of water rights under the mining law and that this control cannot be shared with the federal government without throwing established rights into doubt. Petitioner so argues despite his support elsewhere of the reservation doctrine in which unquantified federally reserved water rights are forever superior to the "established" rights of later appropriators under state law.

IV. DEPARTMENT OF INTERIOR CONSTRUCTION OF THE MINING LAW OF 1872 IS NOT BINDING ON THIS COURT.

Petitioner argues that the "long-standing" Department of Interior interpretation that water is not a locatable mineral under the mining law is "well nigh conclusive" before this Court (Pet. Br., p. 31). On the contrary, this Court is not so bound by Department of Interior decisions. In *County of Marin* v. *United*

States, 356 U.S. 412 (1958), the Court stated, "[w]hile the interpretation given a statute by those charged with its application and enforcement is entitled to considerable weight, it is hardly conclusive." *Id.* at 420.

Because petitioner is charged with administering land laws he claims that under *Udall* v. *Tallman,* 380 U.S. 1 (1965), his interpretation is entitled to "great deference." Again citing *Udall* petitioner asserts, "[t]his deference is especially appropriate where the administrative practice at stake 'involves a *contemporaneous construction* of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'" (Pet. Br., pp. 30-31) (emphasis supplied). *Pagosa Springs,* 1 L.D. 573 (1882) and *William A. Chessman,* 2 L.D. 774 (1883) are the earliest Department of Interior decisions cited by petitioner. Decisions handed down sixteen years after the 1866 Mining Act and twelve years after the 1870 Act can hardly be called "contemporaneous." In addition, neither of those decisions is more than a few conclusory sentences nor did they offer any rationale or authority for their conclusion that water is not a locatable mineral. Yet subsequent Interior decisions rely heavily on these two cases in holding water not locatable under mining law. *See Robert L. Beery,* 25 IBLA 287 (1976) *appeal pending sub nom. Steele* v. *Kleppe,* No. C-76-1840-WHO (N.D. Cal., filed Aug. 26, 1976).

Even "more than a century" of administrative decisions cannot by weight of number or length of time develop statutory interpretation which is immune to a different interpretation by this Court. This is espe-

cially true when the foundation for the line of decisions is as fragile as in the instant case.[7]

V. PETITIONER'S ASSERTION THAT LOCATING WATER UNDER THE MINING LAW MAY LEAD TO ABUSE IS MERE CONJECTURE AND IN ANY EVENT PROPERLY A CONCERN OF CONGRESS AND NOT THIS COURT.

Petitioner's final argument is that if this Court concludes that water is a locatable mineral widespread abuse of the mining laws will inevitably result. This argument is made in significant part by juxtaposing an estimate of the total amount of water available with a schedule of the relatively low fees assessed by the federal government for location and perfection of a claim. The resulting impression that western water resources would be easily susceptible to cheap abuse fails to account for the expense and effort required to locate the water, which is largely underground, and the significant role of the "prudent man" and "marketability" tests in perfecting a claim.

The other aspect of petitioner's argument, that other minerals have been "abused," contains the seeds of its own destruction. Even assuming *arguendo* that some claimants abused claims based on water, those abuses should be remedied neither in this Court nor in advance of proof. Petitioner has cited no authority to support his contention that this Court should not permit the location of water as a mineral because of possible

[7] As Mr. Justice Holmes once lamented:

> It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.

Hyde v. *United States*, 225 U.S. 347, 391 (1911) (dissenting opinion).

abuse. Congress enacted the mining law in its present form and if that law as written is being abused it would be the responsibility of Congress to amend that law. As petitioner himself points out, Congress acted to remove sand, gravel and other specified minerals of widespread occurrence from location under the mining law (Pet. Br., p. 33). Congress has not removed water from the operation of the mining law. Petitioner nonetheless concludes that this Court must not permit the location of water. For this Court to hold water not locatable under the mining law with no supporting statutory language or congressional intent, in advance of any actual abuse of the law, and in an area where Congress has shown it will act if necessary, is untimely and an act in substance if not in form more legislative than judicial.[8]

[8] Petitioner argues that "If location under mining laws were now deemed the exclusive method for acquiring water rights (despite 30 U.S.C. 51 and 52), private rights long established under state law would presumably be invalidated." (Pet. Br., p. 32). This argument can be put to one side. Respondent urges only that location of water under the mining laws is merely an alternative method of acquiring water rights in addition to state law. Water rights which vest under state law must continue to be respected by a mining claimant by virtue of the water provisions of the 1866 and 1870 mining acts.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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FOR ARGUMENT

Supreme Court, U. S.
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No. 77-380

In the Supreme Court of the United States

OCTOBER TERM, 1977

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

CHARLESTONE STONE PRODUCTS CO., INC.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent recognizes that both the mining law of 1872[1] and the Desert Land Act of 1877[2] give federal sanction to private water rights acquired under state law (Br. 16-17). Respondent contends that these provisions were not intended to be exclusive, but that "[w]ater rights may be acquired under either federal mining law or state law and a claim perfected under either must be respected and recognized by future claimants under both systems" (Br. 21).

Respondent acknowledges that this analysis of the statutory provisions regarding water rights enacted in the mining laws of 1866 and 1870 and now codified in 30

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[1]17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*

[2]19 Stat. 377, as amended, 43 U.S.C. 321.

U.S.C. 51 and 52 is inconsistent with this Court's analysis of those provisions in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142.[3] Accordingly, respondent dismisses the Court's discussion in that case as *dictum*, since "[n]either party in *Beaver Portland Cement* was making any claim to water rights on the basis of * * * [the] mining laws" (Br. 16). It is not suprising that neither party was making such a claim. As noted in our opening brief (at 28-31), early administrative decisions had made it clear that the provisions in the mining laws sanctioning private water rights under state law were exclusive and that water was not subject to location under the mining laws. *Pagosa Springs*, 1 L.D. 562 (rev. ed); *William A. Chessman*, 2 L.D. 774, 775; *Charles Lennig*, 5 L.D. 190, 191.[4] The Court in *Beaver Portland Cement*, however, looked to the purpose and effect of the mining law provisions regarding the acquisition of private water rights on public lands to guide its construction of the Desert Land Act, and it read the Desert Land Act and the mining laws as evincing a common intent to sanction state law as the "test and measure of private rights" to water. The Court's discussion of the mining laws therefore was not *dictum*.

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[3]The Court concluded (295 U.S. at 155):

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

[4]Respondent urges that because the earliest of these administrative decisions, *Pagosa Springs*, was handed down in 1882, ten years after the enactment of the mining law of 1872, it was not contemporaneous. However, 1882 was the first year the Department of the Interior compiled and indexed its formal opinions.

Respondent ignores the central fact that over the more than 100 years since the inception of the mining laws, not a single administrative or judicial decision supports the contention that those laws were intended to serve as an alternative to state law as a method of acquiring water rights.[5] To the contrary, in many early cases involving claims to water for use in connection with mining claims, the courts recognized that any water rights must be acquired under state law. *E.g.*, *Campbell* v. *Goldfield Consol. Water Co.*, 36 Nev. 458, 136 Pac. 976; *McFarland* v. *Alaska Perseverance Mining Co.*, 3 Alaska 308, 327-332; *Snyder* v. *Colorado Gold Dredging Co.*, 181 Fed. 62, 67-69 (C.A. 8); *Thorndyke* v. *Alaska Perserverance Mining Co.*, 164 Fed. 657 (C.A. 9); see *Telluride Power Transmission Co.* v. *Rio Grande Western Ry. Co.*, 175 U.S. 639, 647.

2. The unprecedented nature of the conclusion reached by the court of appeals in this case is suggested in the following analysis of the court's opinion by Dean Trelease (described by respondent (Br. 8 n. 1) as "a noted contemporary authority on water law"):

> Ignoring the trial court, the briefs and the arguments, that court found that H_2O is chemically and legally a valuable mineral and that the discovery of water on a placer claim validates that claim under the Mining Law of 1872. *Charlestone Products Co.* v. *Andrus*, 553 F. 2d 1209 (9th Cir. 1977). If this were

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[5]Respondent relies on *United States* v. *Union Oil Co.*, 549 F. 2d 1271 (C.A. 9), certiorari denied *sub nom. Ottoboni* v. *United States*, No. 76-1796, October 31, 1977, rehearing denied February 27, 1978, as authority for the proposition that water is a mineral (Br. 13). As discussed in detail in our brief in opposition to the petition for rehearing, the Ninth Circuit in that case did not consider the question whether water was a locatable mineral, but rather whether Congress intended the reservation of "coal and other minerals" to reserve geothermal resources.

so, mining claims in gravel placers could revive long abandoned common law rules of ground water ownership and capture, and claims on outcropping sandstone and limestone aquifers could raise horrendous problems of priority and extralateral rights. The case cannot be taken seriously however. One of three explanations must be accepted: (1) the court collectively went stark raving mad and by pushing logic to an illogical extreme it reversed 100 years of history and wrecked the state administration of ground water wherever federal lands or retained minerals can be found, (2) the court seized on a seemingly attractive rule to give the mining company legal access to its valuable well on public land, without analyzing the consequences for other cases, or (3) the court is poking fun at and pointing out the inadequacies of the old mining law in order to hasten its demise.

Water Acquisition for Mineral Development Institute, Trelease, "Federal-State Problems in Packaging Water Rights," at 9-17 n. 47 (Rocky Mt. Min. L. Fdn., 1978).

3. Respondent suggests (Br. 21-28) that this Court's recognition of the doctrine of reserved water rights and of other limitations on state authority to restrict the federal government's water rights (*e.g., Federal Power Commission* v. *Oregon*, 349 U.S. 435; *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275) is inconsistent with the position of the government in this case. That position, according to respondent, is that "the states have been given exclusive control of water rights" (Br. 24). We take no such position. We adhere to the reserved rights doctrine, the cases under the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. 383), and the cases under the Federal Water Power Act (41 Stat. 1077, 16 U.S.C. 821)—all of

which deal with the water rights of the federal government, not with the acquisition of water rights by private individuals. Our contention here is only, as this Court stated in *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra*, 295 U.S. at 155 (emphasis added), that state and local laws are "the test and measure of *private rights* in and to the non-navigable waters on the public domain."

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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BRIEF OF AMICI CURIAE

I. INTEREST OF AMICI

The western states named herein as *amici curiae* all have systems for the administration and determination of water rights. Due in significant part to the security afforded by water rights granted under these systems, the West has been transformed into an economically productive and socially inhabitable region. As the Public Land Law Review Commission stated in its report published in 1970:

> "In nearly 100 years of development, state water law has achieved a reasonable certainty of results which has permitted substantial public and private development in the

> West. While sometimes necessarily complex, the state administrative and judicial procedures have provided a means to determine security of rights to the use of water." Public Land Law Review Commission, *One Third of the Nation's Land* 142 (1970).

Because in vast areas of the West rainfall is slight and water is precious, public policy dictated a rule of law under which water rights could be lost by non-use and acquired only by beneficial use of water. Under the appropriation approach, the first to make a beneficial use of water is protected in that right to the extent of his use. What is a "beneficial use" is determined by the law of the state in which the use occurs. Thus, the appropriation doctrine enables the state to prevent waste and mismanagement of its waters and, unlike the riparian doctrine, vests the state with broad control over its waters.

To help facilitate settlement and development of the West, Congress gave its approval to this water law practice. Thus, in the Mining Act of 1866, Congress confirmed vested rights for mining, agricultural, manufacturing and other purposes that were recognized by the local laws and customs, and approved the appropriative system as a method of obtaining future water rights. 14 Stat. 262 (1866), 43 U.S.C. 661 (1970); *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507 (1874); *Basey v. Gallagher*, 87 U.S. (20 Wall.) 670 (1874).

The Desert Land Act of 1877 encouraged the settlement of irrigable lands by making large tracts available to those who would reclaim them. The Act declared that all non-navigable sources of water on the public domain were held free for appropriation. 19 Stat. 377 (1877), *as amended*, 43 U.S.C. 321 (1970).

Any doubts as to the effect of these acts were laid to rest in *California-Oregon Power Co. v. Beaver Portland Cement Co.*,

295 U.S. 142 (1935) where this Court determined that, by these acts, Congress approved and confirmed the policy of appropriation for a beneficial use, "as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measures of private rights in and to the non-navigable waters on the public domain." *Id.* at 155.

The opinion of the Ninth Circuit Court of Appeals in this case did not consider any of the above statutory provisions or their judicial interpretation. It merely observed that the mining laws did not expressly define water as a non-mineral. The court went on to announce the novel conclusion that water is a mineral for which claims to public lands may be located and perfected under the federal mining laws.

The Ninth Circuit's decision disregards the established precedents of this Court, as well as the administrative decisions of the Department of Interior. Moreover, it runs counter to the applicable statutes, in which Congress expressed its intention that acquisition of water rights on public lands is to be governed by state and local laws, not by the federal mining laws. The western states joined as *amici* in this brief therefore wish to advise the Court of their position in opposition to the Ninth Circuit's decision on this issue.

II. QUESTION PRESENTED

Whether water is a locatable mineral under the federal mining laws.

III. SUMMARY OF ARGUMENT

The decision of the Ninth Circuit Court of Appeals that water is a mineral subject to a location under the federal mining laws, is contrary to the established judicial precedent and administrative decisions interpreting the federal mining laws. It also disregards the clear instructions of Congress that the acquisition of

waters on the public domain is to be governed by state and local laws and not by the federal mining laws.

A decision upholding the validity of Claim No. 22 is not necessary in order for the claimant to utilize the water supply within its boundaries. Federal laws clearly provide for the protection and/or acquisition of a right-of-way by the claimant to utilize this water supply on the adjoining valid sand and gravel claims.

IV. ARGUMENT

A. WATER DOES NOT MEET THE BASIC TESTS OF A LOCATABLE MINERAL UNDER THE FEDERAL MINING LAWS

Congress enacted the General Mining Law of 1872 and its predecessors to encourage development of the nation's resources. *See Consolidated Mut. Oil Co. v. United States*, 245 F. 521, 523 (9th Cir. 1917); *Birchfield v. Thiercof*, 5 Ariz.App. 484, 428 P.2d 148, 154 (1967). To induce development, these laws provided that prospectors could obtain interests in the public domain by locating mining claims on public land. As consideration for the transfer of ownership from the United States to the locater, the law required the locater to discover a valuable mineral deposit. *See Davis v. Nelson*, 329 F.2d 840, 845 (9th Cir. 1964).

Discovery of a valuable mineral deposit within the limits of each claim remains a basic prerequisite to a valid mining claim. The test for value requires evidence of a mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable expectation that the minerals from the claims could be marketed at a profit. *See Chrisman v. Miller*, 197 U.S. 313, 322–23 (1905); *United States v. Coleman*, 390 U.S. 599, 602–603

(1968). Marketability is usually the critical factor in cases involving non-metallic minerals of widespread occurrence. *United States v. Coleman*, 390 U.S. 599, 603 (1968).

It is clear that the discovery necessary under the mine location statutes is not satisfied merely by the discovery of something categorized as mineral as opposed to animal or vegetable. Otherwise, there would be justification for making mining locations in virtually every part of the earth's surface. *Rummel v. Bailey*, 7 Utah 2d 137, 320 P.2d 653, 655 (1958). As this Court recognized in *Northern Pacific Railroad Co. v. Soderberg*, 188 U.S. 526, 530 (1902), "the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be expected from the grant without being destructive of it."

Consistent with above principles, the administrative decisions by the Department of Interior have repeatedly held that water is not a locatable mineral and that the acquisition of water rights is not governed by the federal mining laws. *E.g., William A. Chessman*, 2 L.D. 774 (1883); *Pagosa Springs*, 1 L.D. 573 (1882). Last year, after reviewing the prior decisions, the Interior Board of Land Appeals, concluded that water could not be classified as a locatable mineral "[i]f we are to pay more than lip service to the doctrine of *stare decisis* . . ." *Robert L. Beery*, 25 IBLA 287, 292 (1976).[1]

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[1] "Similarly, the courts have held that water is not included within a grant or reservation of minerals. *E.g. Mack Oil Company v. Laurence*, 389 P.2d 955, 960–61 (Okla. 1964); *Vogel v. Cobb*, 141 P.2d 276, 280 (Okla. 1943); *Fleming Foundation v. Texaco*, 337 S.W.2d 846, 850 (Tex.Civ.App. 1960). However, it is important to distinguish water which is necessary and useful for agricultural and domestic purposes from waters in gaseous or liquid form which occur as one component of a depletable subsurface mineral resource system,

The Ninth Circuit Court of Appeals did not note these administrative authorities. Instead, the court determined that "[s]ince early times, water has been regarded as mineral, that it has "an intrinsic value in the desert area." Further, although there was "no evidence of a profitable market of the water per se," since the water could be used to wash the sand and gravel from Charlestone's other claims, and there was a profitable market for washed sand and gravel, the court concluded that "Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid."

If the Ninth Circuit's decision is upheld, the way will be opened for claims to title to public lands, based merely on presence of water, or on a showing that such water is used in the

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such as geothermal resources. In its recent decision holding that geothermal resources were included within the mineral reservation contained in patents under the Stock-Raising Homestead Act of 1916, the Ninth Circuit was careful to distinguish between "fresh water for the use of livestock" and "underground sources of energy for use in generating electricity." *United States v. Union Oil Co. of California*, 549 F.2d 1271, 1279, *cert. denied sub. nom. Ottoboni v. United States*, ... U.S. ....., 98 S.Ct. 418 (1977). Citing the "the obvious distinction . . . between underground water suitable for agricultural purposes and geothermal resources," the court held that geothermal resources were within the mineral reservation. In a similar case concerning whether geothermal resources were included within a grant of minerals, the California Court of Appeal held that the water and steam components of geothermal resources were included within the mineral grant, noting that the geothermal waters were cut off from the normal ground water system and that they were unsuitable for surface, agricultural, or domestic use by virtue of the toxic minerals which they contained. *Geothermal Kinetics, Inc. v. Union Oil Co.*, 73 Cal. App.3d 56, 63–64; 141 Cal. Rptr. 879, 882–83 (1977), *petition for hearing filed in California Supreme Court*, No. 1 Civil 40447 (December 23, 1977). See generally Olpin, *The Law of Geothermal Resources*, 14th Annual Rocky Mountain Mineral Law Institute 123, 140–41 (1968)."

development of other valid mining claims. Such a result is clearly contrary to the established judicial prerequisites to a valid mining claim under the general mining law and is in direct conflict with a long line of decisions by the agency charged with administering the public lands. More fundamentally, the decision runs counter to the congressional policy that private acquisitions from the public lands must be accompanied by commensurate public gain resulting from the exploitation of substances traditionally classed as valuable minerals under the mining laws.

B. THE MINING LAW ITSELF AS WELL AS OTHER SETTLEMENT AND DISPOSAL ACTS MAKE CLEAR THAT CONGRESS INTENDED THAT WATER RIGHTS ON THE PUBLIC DOMAIN BE ACQUIRED IN ACCORDANCE WITH THE LAWS OF THE VARIOUS WESTERN STATES

Because in vast areas of the West rainfall is slight, and land is virtually worthless without an adequate supply of water, western water law came to be based on beneficial use of water rather than correlative rights and the appropriation theory rather than the riparian. Note: *Western Water and the Reservation Theory—The Need for a Water Rights Settlement Act*, 26 Mont. L.Rev. 199, 200 (1965).

By a series of acts in 1866, 1870 and 1877, Congress legitimized the appropriation approach practiced in the western states and declared that water on the public lands was open to use, and water rights thereto were to be obtained under the laws of the states and territories. Thus, Section 9 of the Mining Act of 1866 provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights

shall be maintained and protected in the same. Section 9 of the Act of July 26, 1866, 14 Stat. 253, *as amended*, 43 U.S.C. 661.

Section 17 of the Act of July 9, 1870, 16 Stat. 218, *as amended*, 43 U.S.C. 661, also part of the general mining law, provides that all patents to public lands would henceforth be subject to any vested and accrued water rights recognized under the 1866 law.

Congress again evidenced its intention concerning the acquisition of water on public lands by enactment of the Desert Land Act in 1877. The Act provided that the right to the use of water by the claimant of desert lands should depend on prior appropriation, and that "all surplus water over and above such actual appropriation and use together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." Section 1 of the Act of March 3, 1877, *as amended*, 43 U.S.C. 321.

These early acts have subsequently been amended and portions thereof superseded, most recently by the enactment of the "Federal Land Policy and Management Act of 1976." 90 Stat. 2744 *et seq.*, 43 U.S.C. 1701 *et seq.* However, the above stated water rights provisions remain unchanged.

Any doubts as to the effect of these provisions were laid to rest by this Court in *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935), wherein the Court stated:

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use,

> as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

With respect to Section 1 of the Desert Land Act of 1877, the Court concluded as follows:

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson*, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced. *Id.* 295 U.S. at 162.

The Court went on to conclude that "following the Act of 1877, if not before, all non-navigable waters then a part of the public domain become *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain." *Id.* 295 U.S. at 163–164.

From the preceding pronouncements by this Court, one conclusion seems inescapable. Since usufructory rights to non-navigable waters on the public domain are to be disposed of in accordance

with state laws, such waters cannot, at the same time, be disposed of under the general mining laws. Indeed, since two of the three above stated statutory provisions, which were considered by the Court, were enacted as part of the general mining law, it would be incongruous to suggest that Congress intended to dispose of water under other provisions of the mining law.

Congress not only provided in the general mining law that claimants were obliged to comply with state and local laws in securing unappropriated water for use on the public domain, but also sanctioned the acquisition by claimants of rights-of-way for the construction of ditches and canals by which such water uses could be made practicable. Congress provided in Section 9 of the Mining Act of 1866 that "the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." Section 9 of the Act of July 26, 1866, 14 Stat. 253. As with the right to the use of water on public lands, the right to a right-of-way over such lands under this provision was held to be dependent upon the local customs, laws, and decisions of the court. *Jennison v. Kirk*, 98 U.S. 453 (1878) *aff'g* 51 Cal. 288 (1876).

Such rights-of-way were later protected by Congress in Section 17 of the Act of July 9, 1870, which recognized that all patents granted or homesteads allowed would be subject to vested and accrued water rights, "or rights to ditches and reservoirs used in connection with such water rights." It was held that every use of water for purposes of legitimate mining sanctioned by local custom and law was recognized as a right, and protected by this section as such, and within the protection was embraced the means of conveyance by which such uses were made practicable. *E.g. Jacob v. Day*, 111 Cal. 571, 44 P. 243, 245 (1896).

Although the statute speaks only of "ditches and canals," these

terms were construed to be broad enough so that a right-of-way could be acquired for dams, flues, flumes, pipes, and tunnels. *E.g. Peck v. Howard*, 73 Cal.App.2d 308, 167 P.2d 753 (1946). The right to a right-of-way became vested upon completion of the ditch or canal or other work of diversion and appropriation. *E.g. Manix v. Powell County*, 75 Mont. 202, 243 P. 568 (1926).

The Bureau of Land Management in the Department of the Interior, which administers the public domain lands, has historically recognized and adhered to these Congressional instructions concerning acquisition and protection of water rights and rights-of-way on the public domain. The Bureau has never enunciated a separate policy with respect to acquisition or use of waters by permittees, licensees, lessees, or other non-federal users on the public domain. Their apparent position, consistent with the above congressional mandates, has been that any uses of water required by such persons are their responsibility, to acquire under state law. C. Wheatley and C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 238, 285 (1969).

Subsequent to enactment of the general mining laws, Congress passed legislation authorizing the Secretary of Interior, under general regulations to be fixed by him, to grant rights-of-way over public lands "for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs, used to promote irrigation or mining or quarrying or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses. . ." Act of Feb. 15, 1901, C. 372, 31 Stat. 790.[2] However, Congress did

[2]The recently enacted "Federal Land Policy and Management Act of 1976," repealed several laws relating to rights-of-way including the Act of Feb. 15, 1901, C. 372, formerly 43 U.S.C. 959, under which

not repeal the provisions in the mining laws relating to acquisition and protection of water rights and rights-of-way. Moreover, it was held that the later congressional enactment did not by implication repeal the mining law provisions. In a case decided in 1976 by a federal district court in Colorado, it was determined that the mining law provisions gave to the petitioner recognition of the right to appropriate water under state law and the right to the use of public lands for a pipeline, and that the later congressional enactments relating to rights-of-way in general authorized the Secretary of Interior to condition the use of such right-of-way by regulations to protect the public interest. *Hyrup v. Kleppe*, 406 F.Supp. 214 (D.Colo. 1976).

Pursuant to the congressional authorization, the Secretary of Interior, through the Bureau of Land Management, promulgated regulations pertaining to application for a right-of-way over public lands. These regulations presently provide as follows:

> If the project involves the storage, diversion, or conveyance of water, the applicant must file a statement of the proper state official, or other evidence, showing that he has a right to the use of the water. Where the state official requires an applicant to obtain a right-of-way as a prerequisite to the issuance of evidence of a water right, if all else be regular, a right-of-way may be granted conditioned only upon the applicants filing the required evidence of water right from the state official within a specified reasonable time. The conditional right-of-way will terminate at the expiration of the time allowed. 43 CFR § 2802.1–5 (b)

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the Secretary promulgated these regulations. However, the new legislation also authorizes the Secretary to grant rights-of-way in the public domain for construction of water works to divert and appropriate water. Regulations have not yet been promulgated under the new act, and it is presumed that the existing regulations concerning the acquisition of rights-of-way over the public domain for such purposes will continue to apply until such new regulations are promulgated.

In 1976, Congress enacted the "Federal Land Policy and Land Management Act of 1976." This act specifically repealed the language in the mining laws relating to the recognition and protection of rights-of-way over the public domain for ditches and canals, and also repealed several other laws relating to rights-of-way over the public domain. Sections 702–706, Act of October 21, 1976, 90 Stat. 2788–94. However, Title V of the Act, which relates directly to rights-of-way over public lands, contains two provisions of note. First, Section 509 provides that nothing in the Title "shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." Section 509 of the Act of October 21, 1976, 90 Stat. 2781, 43 U.S.C. 1769(a). Furthermore, Section 501(a)(1) of the new Title continues the policy of authorizing the Secretary to grant rights-of-way over public lands for "reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water." *Id.* 43 U.S.C. 1761(a)(1).

The Ninth Circuit Court did not consider the above statutory provisions, their judicial interpretation, or the administering agency's regulations and practices. Instead, to provide the claimant with access to the water supply on Claim 22 the court determined that Claim No. 22 was a valid claim on the basis that water was a locatable mineral under the federal mining laws. This question was apparently neither briefed nor argued before the Ninth Circuit Court. In any event, it is clear that the court's decision on this issue is entirely contrary to the applicable statutes, in which Congress made clear its intention that the acquisition of water rights on public lands is to be governed by state and local laws, not by the federal mining laws.

It is apparently not possible from the record in this case to establish that the claimant, Charlestone Stone, has a permit from

the State of Nevada to use the water in question. It is clear, however, that ground waters are subject to appropriation under Nevada law, Nev. Rev. Stat. §§ 534.020 *et seq.*, and that Nevada law recognizes water for mining purposes as a beneficial use. *See* Nev. Rev. Stat. § 533.340.

It is also apparent that it is not necessary to uphold the validity of Charlestone's Claim 22 in order to permit Charlestone to use the water from the well located within the limits of the claim in its sand and gravel business. The secretary of Charlestone Stone Products testified in the initial contest before the administrative law judge that, prior to 1964, the corporation "excavated a well with ample water on Claim No. 22 at a cost of $13,000 and installed a large storage tank for use in the washing of gravel." *United States v. Charlestone Stone Products, Inc.*, 9 IBLA 94 (1973). If, in fact, the water on Claim No. 22 was used by Charlestone in the washing of sand and gravel on adjoining claims, then under the then applicable provisions of the mining law, Charlestone obtained the right to a right of way upon the completion of the storage tank and other facilities to put the water to use in its business. *Manix v. Powel County*, 75 Mont. 202, 243 P. 568 (1926). Regulations of the Secretary of the Interior would be applicable only to condition the use of the right of way to protect the public interest. *Hyrup v. Kleppe*, 406 F.Supp. 214 (D. Colo. 1976). Even if Charlestone had not put the water on Claim No. 22 to use in its sand and gravel business, present federal law contains provisions whereby Charlestone may obtain a right-of-way so that it may do so. The "Federal Land Policy and Management Act of 1976" provides that applicants may obtain rights-of-way over public lands for "facilities and systems for the impoundment, storage, transportation, or the distribution of water." Section 501(a)(1) of the Act of October 21, 1976, 90 Stat. 2776, 43 U.S.C. 1761(a)(1).

V. CONCLUSION

Public domain lands administered by the Bureau of Land Management are a major portion of total federally-owned lands in the western states. C. Wheatley, C. Corker, *Study of the Development, Management and Use of Water Resources* on the Public Lands 237 (1969). In reliance upon the congressional directives contained in the public land laws, including the federal mining laws, the states have developed comprehensive systems which assure the physical and legal availability of water for proposed uses by water users on these public lands. By now allowing these water users to obtain rights to water under the federal mining laws, the Ninth Circuit decision would revoke the state's jurisdiction with respect to this water and thus unsettle the law of water rights throughout the western states. The states joined as *amici* in this brief therefore urge this court to reverse the Ninth Circuit's decision on this issue.

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In the Supreme Court
OF THE
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OCTOBER TERM, 1977

No. 77-380

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner,

VS.

CHARLESTONE STONE PRODUCTS CO., INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO FILE BRIEF AMICUS CURIAE
and
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CHARLESTONE STONE PRODUCTS CO., INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO FILE BRIEF AMICUS CURIAE

J. Alan Steele hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of amicus, appearing here pro se, arises from the fact that he is one of the original entrymen of the Chimese springs mining entry, the subject of the IBLA opinion, *Robert L. Beery,* 25 IBLA 287, presently on review *sub nom. Steele v. Kleppe,* N.D. Cal., Civ. No. C-76-1840-WHO. Amicus and his co-locators entered the subject lands in good faith and

claimed deposits of valuable mineral water therein, which were and remain unencumbered by any prior rights.

The question presented in this case is quite broad, and could impliedly include mineral waters. Neither the opinion of the IBLA in *Beery,* above, nor the arguments of the Secretary herein adequately distinguish between mineral waters and waters suitable for ordinary agricultural, industrial or domestic use. Nevertheless, the Secretary has urged this Court to yield to the interpretation of the Department, and has cited and relied upon the Department's opinion in *Beery,* infra, wherein the agency struck down the mining entry without regard for the facts or an adequate distinction. The action of the agency was based upon a naked proposition of law, to wit: that water is not a locatable mineral. The agency's decision was supported only by the argument and rationale set forth in the opinion, *Robert L. Beery,* 25 IBLA 287 (Pet. App. 59a et seq.).

On review, the District Court, Hon. William H. Orrick presiding, has indicated its perception that the issues involving the locatability of naturally occurring mineral spring water are of mixed fact and law, and that the case there may be ripe for remand for a full factual hearing under the doctrine of primary jurisdiction. No order to that effect has yet been entered.

The distinction between ordinary waters and mineral waters (widely recognized by standard authorities as a valuable mineral, and popularly sold in direct

competition with foreign imports), was not briefed by the petitioner, and is of no interest to the respondent, who made no such claim in the lower proceedings.

Therefore, Amicus prays leave to file the attached brief applying the proper distinctions to the matters argued in order that the Court will be aware of the import of the rulings sought by the contending parties.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE
J. ALAN STEELE, PRO SE

I

A. THE ARGUMENTS OF THE IBLA AND THE PETITIONER HEREIN FAIL TO DISTINGUISH BETWEEN MINERAL WATERS AND WATERS GENERALLY.

The arguments presented by the Dept. of Interior, trading upon a failure of distinction between "water generally" and "mineral waters", fail to acknowledge that mineral waters are recognized as a mineral in this country, and that the term 'mineral water' has a distinct and well-documented usage in the English

language and the mining industry predating the enactment of the 1872 General Mining Law.

Mineral waters are reported in Geological Reconnaissance of California, compiled in 1853, and in the report of the first state geologist of the state of California, and in the report of Rossiter W. Raymond, appointed Special Commissioner of Mining Statistics by the Hon. H. McCulloch, Secretary of the Treasury. Raymond's report, containing specific reference to mineral water production and value, was submitted to Congress, referred to the House Committee on Mines and Mining and ordered to be printed Jan. 21, 1869. Danas' Manual of Minerology[1] specifically defines mineral waters to be a mineral (1st Ed. at p. 80) and makes reference therein to the famous Saratoga Springs.[2] Since the time of the foregoing publications, mineral waters have regularly been classified as a mineral in trade and commerce by the official publications of the State of California,[3] the Dept. of Interior Bu-

[1]See Table of Mineral Authorities generally.

[2]These famous mineral springs were the subject of *Hathorn v. Natural Carbonic Gas Co.*, 87 NE 504 (1909), reciting the doctrine that subterranean waters containing salts or gases are a mineral. The case was cited and relied upon by the 9th Circuit in *U.S. v. Union Oil Co.*, 549 F.2d 1271, in support of that Court's holding that "water may be considered a mineral". The foregoing is in accord with Cal. Pub. Res. Code Sec. 2200 defining mineral waters of every kind and character to be a mineral.

[3]See Table of Mineral Authorities, particularly, the 1st through 58th Reports of The State Geologist; Cal. Div. of Mines Bulletin 167, Minerals of California.

reau of Mines and U.S. Geological Survey,[4] as well as by unofficial texts and treatises.[5]

The concensus of these authorities holds that only naturally occurring mineral waters bottled and sold for table or medicinal use are classified as a mineral, and that public supplies and waters used for ordinary domestic or general industrial purposes are excluded. The foregoing distinction is based on scientific as well as commercial definitions.[6]

The Act of May 10, 1872, 17 Stat. 91, 30 U.S.C., Sections 21 et seq., was clearly designed to promote the mining resources of the United States, and provides in Section 1 that "all valuable mineral deposits" in public lands shall be open for location and purchase. The continuing policy of congress to foster and encourage private enterprise in the development of all minerals has been restated in the National Mining and Minerals Policy Act of Dec. 31, 1970, 84 Stat. 1876, 30 U.S.C. Sec. 21a. The question as to whether water in any of its forms or uses is subject to location and within the ambit of the foregoing policy cannot be correctly resolved by ignoring the distinction between

[4]See Table of Mineral Authorities, particularly, Dept. Int. Mineral Resources of the U.S., 1883, 4, Peale, A. C., 1906, 7, 8, Sanford, S.; Springs of California, U.S.G.S. Water Supply Paper No. 338, Waring, G. 1915.

[5]See Table of Mineral Authorities, particularly, A. Ricketts, American Mining Law, 64, 70; Mineral Waters, Fitch; Mineral Springs, Anderson.

[6]See Dept. Int. Mineral Resources of the U.S. 1906, Sanford, at page 1166; Mineral Resources of the U.S. 1923, Part II, at page 109.

mineral waters and other waters as set forth by the standard authorities on the subject.

B. WHETHER A DEPOSIT OF ANY SUBSTANCE IS LOCATABLE IS A QUESTION OF FACT, AND OUGHT NOT TO BE DETERMINED AS A NAKED QUESTION OF LAW.

The Dept. of Interior has long since established the criteria for determining the mineral character of a deposit as being referable to the standard authorities. The standard authorities rule was published by circular and applied in the case of *In re Hooper,* 1 L.D. 560, and again in *Pacific Coast Marble Co. v. Northern Pac. Ry. Co.,* 25 L.D. 243. The rule was relied upon by the 9th Circuit in *Northern Pac. Ry. Co. v. Soderberg,* 104 F. 425 (1900), affd. 188 U.S. 526.

Pursuant to the duty imposed by the Administrative Procedure Act, the Secretary has promulgated and published the rule as follows:

> Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws. 43 CFR, Sec. 3812.1

C. THE DEPARTMENT IS BOUND BY ITS OWN REGULATIONS

The Administrative Procedure Act provides that each agency shall separately state and currently publish in the Federal Register, for the guidance of the public, substantive rules and statements of general

policy or interpretation formulated or adopted by the agency. 5 U.S.C. Secs. 552 et seq. The agency is clearly bound by its own regulations, *Nader v. Nuclear Reg. Comm.* (C.A.D.C. 1975), 513 F.2d 1045; *U.S. v. Wilbur* (9th Cir. 1970) 427 F.2d 947, cert. denied 400 U.S. 945. Clearly, the question of whether any deposit is recognized by the standard authorities is a question of fact that can be determined on a case by case basis.

The 'prudent man test' was announced by the Dept. in 1894 in the case of *Castle v. Womble,* 19 L.D. 455, 457. The test has been consistently applied by the Dept. and repeatedly endorsed by this Court. See: *Chrisman v. Miller,* 197 U.S. 313, 322; *Cameron v. U.S.,* 252 U.S. 450, 459; *Best v. Humboldt Placer Mining Co.,* 371 U.S. 334; *U.S. v. Coleman,* 390 U.S. 599. In *Coleman,* this Court also approved the 'present marketability test' as "a logical complement to the 'prudent man test' which the Secretary has been using to interpret the mining law since 1894" (at p. 602). These tests also raise questions of fact that can be determined on a case by case basis. Traditionally, the ability of the Dept. to make such inquiry has served to protect the public from any abuse by a mining entryman. Both the rules and the tradition have served well and should be retained.

II

A. THE REASONS ADVANCED FOR DECLARING WATER NOT LOCATABLE ARE NOT APPLICABLE TO MINERAL WATER

In *Robert L. Beery,* 25 IBLA 287, when confronted with a clear and convincing prima facie showing, the Dept. of Interior abandoned its own regulations and the foregoing judicially approved criteria, and chose instead to issue an order of nullity and rejection based upon a naked proposition of law, namely, that water is not a locatable mineral. The above order and opinion was supported by a rationale roughly parallel to the contentions of the Secretary in his brief on the merits of the action presently under review.

The opinion of the IBLA suffers from a failure to adequately distinguish mineral waters from water rights generally, and this is nowhere clearer than the language of the opinion itself, as follows:

> "While this case (Chessman) deals with water generally, instead of mineral spring water, specifically, the principle is still the same. . . ."
>
> *Robert L. Beery,* 25 IBLA 287 (Pet. App. 61a).

B. THE DOCTRINE OF STARE DECISIS HAS BEEN MISAPPLIED BY THE IBLA

Notwithstanding the failure of distinction, the IBLA reached its initial conclusion under the doctrine of Stare Decisis (Pet. App. p. 63a). Briefly, the IBLA set forth 5 cases which it contends constitute precedent binding. However, closer analysis shows that the cases are not supportive of that proposition. Firstly; the IBLA cited and relied upon the decision in *U.S. v.*

Union Oil, 369 F.Supp. 1289, since reversed, 549 F.2d 1271, but misquoted the District Court as follows: "The strong weight of authority is that water was not considered to be a mineral" (Pet. App. 63a). The correct quotation of the text reads: "The strong weight of authority is that water was not considered to be a mineral within the test just stated. . . ." Id. at p. 1297. The test referred to is that set forth in *Fleming Foundation v. Texaco* (Civ. App. Tex. 1960) 337 S.W. 846, 852, reversal refused. The test[1] there used is amenable to a distinction between mineral waters and waters generally and reads as follows:

> "We are of the opinion that in deciding whether or not in a particular case exceptional substances are minerals that the true test is what the word means in the vernacular of the mining and mineral industry, the commercial world and the landowners at the time of the grant, and whether the particular substance was so regarded as a mineral." Id. at p. 852.

With respect to *U.S. v. Springer,* 8 IBLA 123 (1972), aff'd, 491 F.2d 239, cert. denied, 419 U.S. 834, the IBLA acknowledges that the locatability of mineral water was not at issue in the case (Pet. App. 62a). A review of the administrative and judicial proceedings discloses that the decision turned on a failure to show compliance with the prudent man rule.

With respect to *U.S. v. Beinick,* 14 IBLA 290, the decision involved the locatability of sand and gravel,

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[1]This test is compatable with the reference by this Court to definitions "generally accepted by text writers on the subject". *Northern Pac. Ry. Co. v. Soderberg,* 188 U.S. 526, at page 536.

and in no fashion touched upon the locatability of mineral water. Similarly, in a footnote (Pet. App. 63a), the IBLA made reference to *U.S. v. Gray,* A-20710 (May 18, 1962), but noted clearly that the case was not concerned with the locatability of mineral waters.

Of all the authority cited by the IBLA, there is only one case that approaches the question of the locatability of mineral waters—*U.S. v. Pagosa Springs,* 1 L.D. 562—and that case is wholly unreliable for the reasons below.

1. The case, if it was such, was decided 12 years before the formulation of the prudent man rule in *Castle v. Womble,* 19 L.D. 455 (1894).

2. The case, if it was such, was decided 65 years prior to the enactment of the Administrative Procedure Act, and was undertaken without the safeguards of that statute.

3. The case, if it was such, reflects no acceptable adjudication, findings or conclusions, but rather a declaration by the Secretary that is Ultra Vires on its face. Action by the Secretary purporting to make law usurps the function of the Legislature, and is quite beyond the power of the Dept. of Interior, the function of which is acknowledged to be limited to an examination of the facts. See, *U.S. v. State of California,* 55 LD. 179.

4. The text of *Pagosa* is set forth in the IBLA opinion at page 289 (Pet. App. 61a), with citations omitted. The true citation is to 9 C.L.O. 230. Copp's

Land Owner is not recognized as an official reporter, and the citation thereto suggests that *Pagosa* may not have been a true case and controversy under the mining law, or that the opinion may not have been the result of an actual adjudication.

5. During discovery proceedings in *Steele v. Kleppe,* Civil No. C-76-1840-WHO, the plaintiffs requested production of the administrative record of *Pagosa Springs* and received the following response:

> "With reference to request No. 1A(1), *U.S. v. Pagosa Springs,* 1 L.D. 562 (1882), the Bureau of Land Management, hereinafter BLM, has been unable to locate an administrative record in this case which is nearly 100 years old, nor is the BLM able to ascertain whether such a record ever existed." Original filed Nov. 24, 1976, U.S. Dist. Court, San Francisco, Ca.

The doctrine of Stare Decisis rests most uncomfortably upon a phantom case. So, too, deference to administrative interpretation is unwarranted where the interpretation at issue lacks the bona fides of jurisdiction, procedure and authenticity. Where, as in *Pagosa,* the notation reflects no regard for the standard authorities, nor for the standard authorities rule, nor for the prudent man rule, it should be given no weight.

C. ALTHOUGH ORDINARY WATERS MAY BE COMMON, THE ARGUMENT REJECTING LOCATABILITY OF WATER BECAUSE IT IS AKIN TO COMMON DIRT IS INAPPLICABLE TO MINERAL WATER.

In the opinion of the Dept. of Interior, the most compelling reason for holding water not to be locatable is that a contrary position would invite abuse (Pet. App. 68a) and the potential for abuse is formidable (Pet. Brief, p. 34). In this connection it should be noted that no such entry is possible on lands withdrawn by the President or the Secretary pursuant to the Pickett Act because the implementing statute permits entries for metalliferous materials only, The Act of June 25, 1910, 36 Stat. 847, amended, 1912, 43 U.S.C. Sec. 142, since repealed leaving existing withdrawals intact, The Federal Land Policy and Management Act of 1976, Oct. 21, 1976, 90 Stat. 2743, Secs. 702, 704, 43 U.S.C. Sec. 1701.

Moreover, pursuant to Sec. 2311.0-3 et seq., 43 C.F.R., all springs and waterholes capable of public use for general watering purposes are subject to withdrawal. The only unreserved sources of mineral waters remaining locatable are those so small as to afford only enough water for one family and its domestic animals. Thus it would seem that the public interest is adequately protected and that the potential for abuse has already been controlled. While water may exist in widespread abundance, there is no reason to believe that deposits of commercially valuable mineral spring water on unreserved public domain land abound. At the very least, there remains an untested

question of fact upon which the propriety of the Department's fears must rest.[8]

The subsidiary argument to the effect that mining entries for water would fail to produce the traditional gains (Pet. for Cert. p. 13) is also ill-adapted to entries for mineral water, which promise to place a valuable commodity into the stream of commerce. The development and exploitation of mineral waters requires specialized techniques and equipment for purification, bottling, capping, and labeling. The expenditures for the foregoing, as well as for construction, maintenance, labor, shipping, taxation, advertising and marketing—all of which are supported by the mining enterprise—clearly constitute the traditional gains from the exploitation of the mineral resources of the public lands.

III

A. THE POTENTIAL CONFLICTS CITED BY THE SECRETARY ARE BASED UPON A MISUNDERSTANDING OF THE LAW, AND DO NOT APPLY TO MINERAL WATER.

The Secretary argues that the effect of the water rights provisions of the mining law is to render water disposable only in accordance with state law, and thus, "it could not at the same time be disposed of under

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[8]This question was never raised in *Robert L. Beery*, 25 IBLA 287, nor was any evidence on the question adduced. In the instant case, Petitioner has set forth certain figures on the amount of public domain land, but has neither shown nor asserted that mineral waters exist thereon in substantial amounts.

the general mining law." (Pet. App. 70a, Pet. Brief, p. 11). The effect of these provisions is discussed at length in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 144. The Court there indicated that the provisions constituted a voluntary recognition of a pre-existing right of possession, rather than the establishment of a new one, and that the intent of Congress was to make it clear that the Grantees of the United States would take their lands charged with the existing servitude (id. p. 155). The language of the Court does indicate that the rule reaches into the future and applies to mining entries. But, far from raising (new) potential conflicts, the rule states the manner in which such conflicts are to be settled, and places a limitation on the entryman with respect to prior rights. To the extent that the law protects prior appropriators it is not mere surplusage, and yet in the absence of a prior right, the rule cannot be said to preclude a mineral entry.

In discussing the effect of the Desert Land Act, 19 Stat. 377, 43 U.S.C. Sec. 321, The IBLA (Pet. App. 69a, 70a) and the Secretary (Pet. Brief, p. 21 et seq.) take the position that water—impliedly including mineral water—can only be disposed of in accordance with state law, and therefore could not be disposed of under federal law. That position does not square with the opinion of this Court.

> "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the control of the designated states . . . with

> the right of each to determine for itself to what extent the rule of appropriation or the common law rule of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state' Kansas v. Colorado, 206 U.S. 46, 94 . . . the Desert Land Act does not bind or purport to bind the states to any policy. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, at pages 163, 164.

Thus, if the states sanction a mining entry for mineral water (even with legal or equitable limitations), or if such entry is not prohibited by state law, then appropriation under the mining law does not offend the provisions of the Desert Land Act, and there is no reason for this Court to declare that mineral waters are not locatable on that account.

B. THE EXPLOITATION OF MINERAL WATERS CAN BE CONTROLLED WITHOUT DECLARING SUCH DEPOSITS NOT TO BE A MINERAL.

The potential difficulties regarding the disposition of mineral waters are similar to those encountered in the exploitation of other liquid minerals such as oil and geothermal steam. Legislative solution of these difficulties has been achieved by the enactment of leasing laws. Most recently, the legislation concerning geothermal steam preceded the judicial determination that the deposits are mineral in nature. See, The Geothermal Steam Act, Oct. 21, 1970, 30 U.S.C., §1001 et seq.

In the instant case, the Court's finding that mineral entry of lands containing valuable deposits of natural mineral spring water is not barred would provide the Secretary with a settled basis upon which to seek any legislation required to clarify and protect the public interest. And although the task is not beyond the ability of the courts, facility may be gained by amplifying legislation.

CONCLUSION

For the foregoing reasons, if the Court should hold water not locatable, it should not also prohibit bona fide mineral entry for valuable deposits of natural mineral water.

Respectfully submitted,

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February, 1978.

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LEGEND

- EXCAVATION PIT
- BULLDOZER CUT
- TEST PIT
- IMPROVED ROAD
- UNIMPROVED ROAD
- ST. CL. 95 BOUNDRY
- TRANSMISSION LINE
- CADASTRAL SURVEY MONUMENT
- WELL
- ROCK OUTCROP

MAP BASE PREPARED FROM AERIAL PHOTOGRAPHS TAKEN 4/15/65

CHARLESTON GROUP

KAREN GROUP

CHARLESTON SPUR NO. I

N

QUARRY

APPROX LOCATION OF UNPATENTED LODE CLAIMS

SCALE IN MILES

0 1/4 1/2 1

INDEX MAP OF UNPATENTED PLACER MINING CLAIMS IN THE LONE MT. CANYON AREA